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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~1-835-1~~

GAS LIGHT COMPANY OF COLUMBUS, *Petitioner*

vs.

GEORGIA POWER COMPANY and
THE SOUTHERN COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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Petitioner Gas Light Company of Columbus prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (Court of Appeal No. 30,091), entered in the above-entitled case on March 23, 1971.

OPINIONS OF THF COURTS BELOW

The judgment and opinion of the United States District Court for the Middle District of Georgia (Columbus Division) of June 6, 1970, dismissing substantially all of plaintiff-petitioner's antitrust claims and granting defendant-respondents' motion for partial summary judgment as to those antitrust claims is reported at 313 F. Supp. 860 (M.D. Ga. 1970). A copy of that judgment and opinion is set forth in Appendix A to this petition, *infra.*

Petitioner appealed the adverse decision to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1291. That Court affirmed the judgment of the District Court dismissing the petitioner's antitrust claims. The opinion of the Court of Appeals is reported at 1971 CCH Trade Reg. Reporter ¶73,522, page 90,117, and is also set forth as Appendix B to this petition, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1971 (see Appendix B). Neither a rehearing nor an extension of time was sought or granted. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

This case presents the extremely important question of the extent to which the federal antitrust laws are

interdicted or effectively repealed by state regulatory agencies. As such, this case presents questions of great significance regarding the national economic policy favoring vigorous enforcement of the federal antitrust laws; particularly, whether the so-called "state-action immunity" recognized in *Parker v. Brown*, 317 U.S. 341 (1943) should be confined within its originally intended limits, or whether that immunity should be expanded to except virtually all state regulated businesses from the application of the antitrust laws. Specifically the questions raised in our present case are:

(1) Whether, under *Parker v. Brown*, supra, voluntary business practices undertaken by an electrical utility corporation which would violate the federal antitrust laws to the detriment of a competing supplier of natural gas are immunized merely because such practices are the subject of an order by the Georgia Public Service Commission, even though (a) the State of Georgia has a long-standing policy favoring vigorous, open and fair competition between suppliers of electricity and suppliers of natural gas and (b) there was no showing whatever that the Commission's orders were intended to interdict such competition?

(2) Whether the Courts below erroneously extended the doctrine of "primary jurisdiction" by granting antitrust immunity as to any business practice or conduct approved or "ordered" by such an agency irrespective of its anticompetitive purpose or effect?

STATUTES INVOLVED

1. The Sherman Act, Section 1 (15 U.S.C. §1) provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

2. The Sherman Act, Section 2 (15 U.S.C. §2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

3. The Clayton Act, Section 3 (15 U.S.C. §14) provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities, of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

4. The Clayton Act, Section 4 (15 U.S.C. §15) provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

(A) The Nature of the Case.

The present case arises out of a private antitrust suit filed by petitioner Gas Light Company of Columbus (hereinafter "Columbus Gas Light" or "petitioner") pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) against respondents Georgia Power Company (hereinafter "Georgia Power") and The Southern Company (hereinafter "Southern"). Petitioner, in its complaint (See Appendix[1], pages 1-10), sought to recover damages which it had sustained as a result of the respondents' alleged violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) and Section 3 of the Clayton Act (15 U.S.C. §14).

Petitioner is an investor-owned public service corporation which is primarily engaged in the distribution of natural gas as a form of energy serving the City of

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[1]References are to the Single Appendix filed in the United States Court of Appeals for the Fifth Circuit, which in fact comprised the entire record on appeal. Therefore, hereinafter, citations to the Appendix will be as follows: "(R.....)"

Columbus, Muscogee County, and Fort Benning, Georgia. Respondent Georgia Power is an investor-owned utility corporation engaged in the generation, transmission, distribution and sale of electrical energy in substantially all of the State of Georgia. Respondent Southern is a holding company which owns substantially all of the stock in defendant Georgia Power. (R. 2-3.)

Georgia Power is in competition with Columbus Gas Light in the sale of energy within the geographical area served by the petitioner. (R. 5.) In its complaint, Columbus Gas Light alleged that the respondent, particularly Georgia Power, entered into unlawful combinations and conspiracies to monopolize the market for energy and to restrain trade and commerce therein with the objective of and intent to suppress and eliminate competition of natural gas companies such as petitioner. (R. 6.)

(B) Course of Proceedings and Disposition in the Courts Below.

This case was filed by petitioner on or about January 13, 1969. (R. 1.) Subsequently, respondents made a motion for summary judgment urging that (1) interstate commerce was not sufficiently involved to support jurisdiction under the federal antitrust laws; and (2) the activities of the respondents which formed the basis for the complaint were regulated by the Georgia Public Service Commission and therefore immune or excluded from the scope of the federal antitrust laws. (R. 78, *et seq.)*

After briefing and oral argument, the United States District Court for the Middle District of Georgia granted respondents' motion for summary judgment as to nearly all of petitioner's antitrust claims. (See Order and Opin-

ion of the Court. R. 256, also pp. 227, *et seq.)* The Court did not rule on respondents' contentions with respect to the interstate commerce question. (R. 229.) The Court ruled that the anticompetitive practices of respondents which were regulated by the Georgia Public Service Commission were immune from the federal antitrust laws. The District Court also ruled—as to one of petitioner's claims, that of an alleged tying arrangement—that underground wiring was not a product separate and distinct from the electricity for purposes of Section 3 of the Clayton Act. (R. 254-255.)

On June 6, 1970, the District Court, in accordance with its order and opinion, entered final judgment pursuant to F.R. Civ. Proc., Rule 54(b) dismissing the complaint and denying all relief requested therein with the exception of the claim set forth in subparagraph 12(f) thereof. (R. 259-260.) Columbus Gas Light filed its Notice of Appeal on June 15, 1970. (R. 261.) The jurisdiction of the United States Court of Appeals for the Fifth Circuit was invoked pursuant to 28 U.S.C. §1291.

In its decision, affirming the ruling of the District Court, the Fifth Circuit Court ruled that:

(1) The Georgia Public Service Commission had the power to regulate the rates and practices of public utilities in the State of Georgia;

(2) The anticompetitive rates and practices here complained of were the subject matter of regulations by that Commission, and

(3) "Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission

as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption." (Appendix B, p. xxxv.)

(C) Statement of Facts.

All of the parties in the present case entered into a stipulation for purposes of the motion for summary judgment. This stipulation (R. 29-78) sets forth the relevant facts and contentions of the parties with respect to the interstate commerce issue as well as the present controversy concerning the alleged immunity of respondents' practices from the antitrust laws. This stipulation and the facts found by the District Court will be briefly summarized.

Petitioner is engaged in the business of distributing and selling natural gas as a form of energy to consumers in the area of the City of Columbus, Muscogee County, and Fort Benning, Georgia. Respondent Georgia Power is engaged in the business of distributing and selling electricity as a form of energy to consumers in this same geographical area (as well as other portions of the State of Georgia). Thus, within petitioner's area of operation, it is in substantial competition with Georgia Power in the sale of energy to consumers. (R. 228.)

It was established in the District Court that, with respect to some uses of electricity, defendant Georgia Power has an absolute monopoly (or "captive load") and encounters no competition from petitioner in that no form of energy other than electricity can be utilized. (For example, only electric power can be used for illumination or for operation of most of the smaller household appli-

ances such as television sets, mixers, irons, automatic can openers, toothbrushes, radios, clocks, electric shavers, *etc.*) Indeed, it should be noted that electricity is essential for the operation of motors used in gas appliances. (R. 117.)

As to other uses of electricity, natural gas is a competitive form of energy. Thus Columbus Gas Light and Georgia Power are in direct competition in serving consumer needs for space heating, water heating, air conditioning, cooking, refrigerating, and clothes drying. (R. 117.)

Petitioner contends that respondents engaged in various monopolistic anticompetitive practices and that they combined with each other and with additional co-conspirators to suppress or eliminate the competition from suppliers of natural gas including petitioner, by various predatory means. Pursuant to this plan, it is alleged that respondents engaged in the following anticompetitive practices. (See R. 33-34):

(a) They adopted and implemented rate schedule B-10-B, which petitioner contends is preferential because the "qualifying load" consists of usages in which natural gas is competitive with electricity; petitioner further contends that said rate schedule permits respondent Georgia Power to sell electricity for such competitive uses at less than its incremental cost;

(b) They adopted and implemented an Underground Residential Distribution Wiring Plan which petitioner contends constitutes a means by which Georgia Power "bribes" general contractors to construct totally electric subdivisions and/or apartments;

(c) They adopted and implemented a Residential Wiring Plan, Rule G, which petitioner contends is another means of "bribing" builders to go "totally electric" in single family residences and apartments;

(d) They adopted and implemented Rate Schedule TE-2, the "budget billing" feature of which, petitioner contends, has been misrepresented and misinterpreted to constitute a guaranteed flat charge for electricity; and

(e) They used restrictive covenants in land deeds, which covenants require that any building or dwelling erected on the deeded property be "total" electric.

Under Georgia Law, regulation of the rates and services of public utilities, which includes respondent Georgia Power, is vested in the Georgia Public Service Commission and Georgia Power is obligated by law to comply with orders of the Georgia Public Service Commission as to rates and services. All of the matters complained of below by petitioner, with the exception of (e) above, are subject to regulation by the Georgia Public Service Commission, and have been the subject of extensive hearings before said Commission on complaints of Columbus Gas Light, Atlantic Gas Light Company, and others. (R. 34-39.) These matters were initially presented to the Commission by respondent Georgia Power seeking approval of their proposed activities. As to some of these, the Georgia Public Service Commission approved Georgia Power's requests as submitted. In other instances the Commission disallowed the original plan as presented by Georgia Power and "ordered" respondent to adopt and comply with a related plan substituted by the Commis-

sioner. (R. 234-235.) However, even in these latter instances, the rates or plans substituted by the Commission included the anticompetitive practices originally proposed by respondent and which are the subject matter of this antitrust suit. (R. 44-71.)

REASONS FOR GRANTING THE WRIT

I. THERE EXISTS SHARPLY DIVIDED AND IRRECONCILABLE DECISIONS IN NUMEROUS CIRCUITS ON THE SCOPE OF THE PARKER v. BROWN IMMUNITY.

Since 1970 five Courts of Appeal in four circuits have been confronted with immunity defenses under the doctrine of *Parker v. Brown.* These Courts have hopelessly and irreconcilably divided on the scope of the antitrust immunity conferred by *Parker.* The cases, chronologically by date of decision are: *G. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970); *Woods Exploration & Producing Co. Inc. v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) (January 5, 1971); *Washington Gas Light Co. v. Virginia Electric and Power Co.,* 438 F.2d 248 (4th Cir. 1971) (Feb. 12, 1971); *Gas Light Co. of Columbus v. Georgia Power Co.,* ..... F.2d ..... (5th Cir. 1971) (March 23, 1971) and *Hecht v. Pro-Football, Inc.,* ..... F.2d ..... (D.C. Cir. 1971) (April 27, 1971).

The controlling issue in each of these cases was whether approval of private anticompetitive activity by an agency of the state immunizes the private conduct from antitrust sanctions and remedies.

In *G. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), the First Circuit Court of Appeals narrowly and rigidly construed the nature of the immunity from antitrust sanctions articulated in *Parker*. The Court ruled that a public agency's adoption of defendant's exclusionary specifications was accomplished by means of predatory and anticompetitive practices on the part of that defendant, and no immunity from the antitrust laws was applicable under *Parker v. Brown* notwithstanding the approval of the defendant's anticompetitive plan and practices by the state agency there involved. The Court, in *Whitten*, recognized that the *Parker v. Brown* immunity arises *only* when the state legislature makes a determination that certain particular aspects of free competition are not in the public interest and, therefore, it *commands* that specific otherwise anticompetitive practices be pursued. (424 F.2d at p. 30.)

In *Woods*, the Fifth Circuit (with a panel completely different than that in our present case) adopted an enlightened approach to this complex problem. Judge Goldberg's carefully reasoned analysis of the *Parker v. Brown* issue began by rejection of the argument "that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws." (438 F.2d at 1302.) Judge Goldberg adopted the view that:

> "state regulation does not mean that there is no room for antitrust policies to operate. Our antitrust laws constitute our economic magna carta, designed to protect against predatory oppression. Conceived as such a writ they must not be facilely negated. . . . We therefore think it incumbent upon this court to render both state regulatory and federal antitrust

> goals complementary rather than mutually exclusive." (438 F.2d at 1302.)

At complete odds with this reasoned approach is the sweeping repeal of antitrust as applied to any state-regulated agency announced by the Fourth Circuit in the *Washington Gas Light* case. And closely following that decision, and based largely on its reasoning, the panel of the Fifth Circuit which decided this present case read *Parker v. Brown* as conferring antitrust immunity as to any practices by private businesses which are the subject matter of an order by a state regulatory agency. The necessary effect of the ruling below then is to grant immunity from the antitrust laws as to any private business activity which has been approved by a state commission. As the Court below stated:

> "Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption." (Opinion, Appendix B, *infra.*)

In *Hecht v. Pro-Football, Inc., supra,* the Court of Appeals for the District of Columbia developed a slightly different interpretation of the immunity problem. There the conflict was between two allegedly inconsistent *federal* policies: the antitrust laws and legislation dealing with a sports stadium within the District. Recognizing that the problem was similar to *Parker v. Brown* the Court acknowledged the wisdom of Judge Goldberg's approach in *Woods* while implying that Judge Bell's treatment below of the controversy herein gave undue weight "to the

sheer existence of state action" and did not "attempt to reconcile antitrust and regulatory policies". (___ F.2d ____.) Moreover, the *Hecht* Court articulated more clearly than any Court before it, that the decision in *Parker v. Brown* involved "regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, the Agricultural Adjustment Act, enunciated by the national Congress, which is also the source of the federal antitrust policy." In short, the anticompetitive plan adopted by the Calfornia legislature in *Parker* was not at odds with Congress' own policies insulating agricultural activities from free market forces in order to avoid disastrous economic consequences in that industry.

Viewed in its setting, *Parker v. Brown*, as we shall demonstrate, provided only the narrowest immunity from the antitrust laws. Unless reversed by this Court the sweeping exemption announced below, then, will open the door for a myriad of state regulatory agencies, commissions and boards supervising various industries in 50 different states, to substitute their own standards in place of antitrust remedies in the regulation of trade and commerce affecting national interests and policies. Surely this Court could not have intended such a result by its pronouncement in *Parker v. Brown*.

II. THE RULINGS OF THE COURTS BELOW IMPROPERLY EXPAND THE IMMUNITY AS RECOGNIZED IN PARKER v. BROWN AND ERRONEOUSLY INSULATE THE ANTI-COMPETITIVE BUSINESS PRACTICES OF REGULATED INDUSTRIES FROM THE SCOPE OF FEDERAL ANTITRUST LAWS.

This case presents an issue of great significance regarding the general application of federal antitrust rules and policies. As stated above, the question is one over which much confusion has recently developed in lower federal courts throughout the nation:[2] to what extent do the federal antitrust laws apply to anticompetitive business practices within the so-called regulated industries, particularly as to those private businesses whose activities are regulated by state administrative agencies or commissions.

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[2]See, for example, the analysis of the recent cases discussed above, including the decision of the Fifth Circuit below in BNA Antitrust & Trade Regulation Report (No. 514), May 25, 1971, p. B-1. The analysis states (at p. B-2):

> "Some observers are doubtful about the reasoning in these cases, especially VEPCO, where silence was construed as approval of the promotions even though the regulatory commission ultimately prohibited such practices. These observers question whether such privately initiated practices are properly "state action" within the meaning of the *Parker v. Brown* doctrine. They suggest that where the state regulatory scheme contemplates some competition, as here, between gas companies and electric companies, the antitrust laws may be held to apply."

And concludes (at p. B-4):

> "Some observers hold the same view as the D.C. Circuit in thinking that *Parker v. Brown* should be reconsidered in light of its particular facts, *i.e.*, that state regulation pursuant to an over-all federal regulatory scheme was involved. Accordingly, they think that the scope of exempted 'state action' will be more strictly limited and that antitrust will play a more important role in this area than that which would be allowed by the decisions of the Fourth and Fifth Circuits."

This Court is here urged to correct the recent erroneous interpretations of the *Parker v. Brown* doctrine as typified by the ruling below, and to reinstate and re-apply federal antitrust laws and policies to the operations of these numerous multi-billion dollar private "regulated" businesses and their predatory and anticompetitive practices. For, as will be demonstrated herein, the decision of the Fifth Circuit Court below—in expanding and enlarging the antitrust immunity—not only undermines the national policy of open competition and fundamental "economic liberty" which the antitrust laws were designed to advance, *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 4 (1958), but it ignores the limited nature of the *Parker* case itself.

To properly interpret the *Parker v. Brown* ruling, it is necessary to examine the policy which guided this Court in its recognition of the so-called "state action" immunity from federal antitrust laws. In *Parker* the Court recognized that in limited instances and under rare and extreme circumstances, a state legislature may make a deliberate and conscious decision directing private business entities to engage in anticompetitive conduct which would contravene the principles of free and open competition demanded by federal antitrust laws. In these instances, the state itself has determined that some important local public interest would be seriously impaired by the very type of open competition which that state now specifically prohibits.

In *Parker v. Brown,* the State of California had made a legislative policy determination that its important raisin industry could not survive under the traditional rules of

free and open competition. The legislature made the judgment that a marketing proration plan was necessary. Thus, the state, through its legislature, decided to limit competition in the raisin industry in certain respects.[3] This Court's description of the precise "state action" there present is particularly relevant:

> "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, *so as to restrict competition among the growers and maintain prices in the distribution of their commodities* to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agriculture crops' of the state." 317 U.S. at p. 346. (Emphasis added.)

The Act also created an administrative Commission to carry out the details and supervise the enforcement of the prorate plan. Thus, in *Parker* the plaintiff was challenging the essence of the marketing program which the state legislature had established. In *Parker* the plaintiff was demanding free and open competition of the type which the legislature had expressly suspended. Had the plaintiff prevailed in *Parker,* the entire state prorate marketing program would have fallen. Indeed such was precisely the relief sought in that case. 317 U.S. at p. 344.

Our case is clearly distinguishable from *Parker v. Brown.* Petitioner Columbus Gas Light is not challenging

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[3]It should be noted that in *Parker,* this Court recognized that the California Raisin Prorate Program was consistent with federal policies within the agricultural industry. 317 U.S. at pp. 352-358.

the basic articulated policies which prompted the State of Georgia to create its Public Service Commission; nor is petitioner challenging the authority of the Commission to operate as prescribed by Georgia law. Petitioner Columbus Gas Light urges this Court to recognize that the State of Georgia has *not* made a legislative determination in any way analogous to that embodied in the California Prorate Act which would immunize the private defendants in our case from the operation of the federal antitrust laws.

It is true that in the creation of the Public Service Commission, the State of Georgia has abolished some of the competitive considerations which would otherwise be applicable to public utilties such as electric power and natural gas suppliers. For example, in creating such franchised monopolies, the State has made the legislative judgment that only one supplier of electricity and one supplier of natural gas shall serve any given geographic area within the state. Therefore, by command of the State, there can be no competition among suppliers of electricity for the consumers' business. If a resident of Columbus, Georgia desires electricity, he must purchase it from respondent Georgia Power. He has no other alternative. Under normal rules of free and open competition, the agreement between Georgia Power, the State of Georgia and others to so allocate geographic markets would constitute a *per se* violation of the antitrust laws. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

But under *Parker v. Brown* such a division of markets is valid because done at the command of the State which

has previously made a deliberate prudential judgment that free and open competition in the supply of electricity would not be in the best interests of the public. The State has thus created a monopoly and established the Public Service Commission to supervise and regulate certain activities therein to insure that the public utilities do not abuse the monopolistic power which they have been given. As such, the Commission's primary duty is to protect the consumers from unreasonably high rates and unjust discrimination. Georgia Code §93-309; Georgia Public Service Comm. Laws and Rules, p. 9.

Thus, if in this case petitioner was a competitive supplier of electricity seeking to enjoin the agreement between defendant Georgia Power and the State of Georgia as a monopolistic and illegal division of markets, then the *Parker v. Brown* immunity would apply. For in such a proceeding, the petitioner would be challenging the very heart of the program of franchised public utilities which the State has purposefully and deliberately established for the benefit of its citizens. But our present case is patently different from the hypothetical proceeding described above.

Petitioner Columbus Gas Light is a supplier of natural gas. In its area of operation it competes with respondent Georgia Power. This competition between the two utilities is authorized and sanctioned by the State. Unlike the situation in *Parker v. Brown,* there is no indication here that the State of Georgia disapproves of or wishes to suspend the traditional considerations of fair, free and open competition between natural gas and electricity as competing forms of energy for Georgia consumers. In

fact, all indications are that fair, free and open competition between suppliers of energy such as Columbus Gas Light and Georgia Power is officially favored and encouraged by the State of Georgia.

For example, Article IV, Section 4(3) of the Georgia Constitution which creates the Public Service Commission provides:

> "There shall be a Public Service Commission for the regulation of utilities, vested with the jurisdiction, powers and duties now provided by law or that may hereafter be prescribed by the General Assembly, *not inconsistent with other provisions of this Constitution.* . . ." (Emphasis added.)

The enabling provision which created the Commission must therefore be read with the constitutional language of Article IV, Section 4(1):

> "All contracts and agreements which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement."

To prove beyond doubt that the State of Georgia did not intend to confer antitrust immunity on the activities of the respondents here challenged, one need only peruse other constitutional, legislative and administrative provisions which prohibit unreasonable rates or charges, rebates, unjust discriminations and deceptive practices. Georgia Const., Art. IV, Section 1(1) and (2); Georgia Code §93-309 and 310; Georgia Publ. Serv. Comm., General Rules, Rule 2. See also: *Re Electric Light & Power*

Rates, Practices and Services in Savannah, Ga., 1917E P.U.R. 46 (1917).

Whereas in *Parker,* the operation of the federal antitrust laws would have frustrated and destroyed the California raisin marketing program, the application of antitrust policy to the alleged activities of the respondents herein would be consistent with the public utility laws of the State of Georgia. There can, therefore, be no justification for the decision of the Fifth Circuit Court of Appeals, below, immunizing the respondents' conduct under *Parker v. Brown.*

The mere fact that the respondents' plans and programs were approved by the Public Service Commission is insufficient to confer antitrust immunity. As stated above, under Georgia law the Commission is primarily concerned with the relationship between a specific utility and the consumers which it serves. The Commission is not authorized to suspend the rules of fair competition as between electrical and natural gas suppliers; nor can we assume that, by its orders, the Commission intended or could have accomplished such a result. As this Court recognized in *Parker v. Brown,* 317 U.S. at p. 351,

> ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ."

In holding that the practices of Georgia Power Company are the "products of the Commission" and therefore state activity not subject to antitrust regulation, the Fifth Circuit has given significance and dimension to the Commission's action totally unwarranted by Georgia law. In *Georgia Power Co. v. Georgia Public Service*

Commission, 211 Ga. 223, 229, 85 S.E. 2d 14, 19 (1954), the Supreme Court of Georgia stated:

> "The Commissioners are not the managers of this company, but their function is to regulate and disapprove any dishonest or clearly inefficient conduct and practice by the utility. Georgia Public Service Comm. v. A. & W.P.R. Co., 164 Ga. 822 [139 S.E. 725]; Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission [262 U.S. 276, 43 Sup. Ct. 544, 67 L.ed. 247, 42 A.L.R. 1232]; Chicago M. & St. P. Ry. Co. v. Wisconsin, 238 U.S. 491 (35 Sup. Ct. 869, 59 L.ed. 1423, L.R.A. (1916A) 1133); Banton v. Belt Line Ry., 268 U.S. 413 (45 Sup. Ct. 534, 69 L.ed. 1020)."

In addition, it is extremely important to emphasize the minimal nature of Commission action which constitutes approval of a utility's rates or practices. Indeed non-action by the Commission will have this effect. *Columbia Baking Co. v. Atlanta Gas Light Co.,* 78 Ga. App. 241, 50 SE 2d 382 (1948).

In view of the State constitutional provisions quoted above and the rulings by the Georgia courts, it is startling indeed for the contention to be made that the Georgia legislature has expressly or by fair implication empowered the Commission to eliminate principles of competition between the electric utilities on the one hand, and gas utilities and competing fuel suppliers on the other. In *Re: Electric Light & Power Rates, Practices and Services in Savannah, Ga., supra,* an early proceeding under the identical legislative authority, the Commission itself stated, relying on that constitutional provision which prohibits the legislature from enacting

legislation designed to defeat or lessen competition (then codified as §6466 of the Georgia Code):

> "This constitutional provision (Code, §6466) had in view the encouragement and fostering of competition in its fullest sense, and expressly forbade the legislature from authorizing any transactions between corporations which would defeat or lessen competition. The anticipated benefits of competition could only be reflected in rates and services. Having safeguarded the public against unreasonable and unjustly high rates, the framers of the Constitution evidently had in mind the securing for the public the lowest rates and best service that competition might bring about. *The constitutional framers were evidently distrustful of even regulated monopoly.*" (1917E P.U.R. at 726). (Emphasis added.)

There is nothing in Georgia law which requires an electric utility to file a residential wiring plan, or a rate schedule for customers with "qualifying loads" (B-10-B) or a separate rate schedule for total electric residential customers (TE-2) or any of the practices in question in this antitrust action. The variety and range of practices or policies which the Commission might find to be within the limits of managerial discretion is quite broad. A finding by the Commission that particular practices are within the prerogatives of management is in no sense a directive by the Commission to Georgia Power to institute and implement such practices in violation of the principles of fair competition.

The Fifth Circuit below, relying heavily on the recent Fourth Circuit decision, *Washington Gas Light Co. v. Virginia Electricity & Power Co., supra,* ignored all of

these pertinent policy considerations and went on to rule that the mere fact that the predatory practices challenged in this antitrust action were the subject matters of "orders" and approved by the Georgia Public Service Commission, immunized such practices from the antitrust laws. The predatory nature of the respondents' practices are beyond question in this proceeding. Petitioner sought to prove below that respondent Georgia Power utilized its "captive load" monopoly power to induce consumers to purchase electricity for those uses in which natural gas is a competitive form of energy. In effect, respondent is abusing the legal monopoly it enjoys in "captive load" uses to penalize and discourage consumers from using natural gas even though, if a free choice was possible, such consumers would prefer natural gas for some of the competitive uses (e.g., space heating, cooking, *etc.*). Compare: *United States v. Griffith,* 334 U.S. 100 (1948).

As to respondents' underground wiring and residential wiring plans, it is clear that respondent Georgia Power illegally combines and conspires with the developers of new subdivisions providing the latter a credit against the cost of the underground installation. The credit is calculated in a manner which makes it profitable for the developer to insure that all homes being constructed will utilize electricity rather than natural gas as a source of energy for such uses as space heating. These new subdivisions have come to be known as "totally electric" meaning that electricity is the sole source of energy in each home therein. This has been achieved through certain predatory practices pursued by the respondents in conjunction with the developers and their salesmen. These

wiring plans operate to deprive the new homeowner of an opportunity to make a choice on the basis of competitive considerations as between electricity and natural gas as a form of energy. These agreements between respondents and the subdivision developers (who are able to effectively control whether natural gas or electricity will be utilized by the prospective residents for space heating, water heating, cooking, air conditioning, clothes drying and refrigeration) resulted in the elimination of petitioner as a competitor of Georgia Power in substantial portions of the total residential market. This Court has consistently condemned such anticompetitive practices. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Ry. Co. v. United States, supra.*

It is clear that many consumers would and do prefer natural gas to electricity as a form of energy, especially for cooking and space and water heating. Nevertheless in our present case, the builders of new residential developments have been and continue to be coerced and induced by respondent's practices to preclude themselves and the home buyers from utilizing natural gas for these purposes.

The underground wiring and residential wiring plans are especially insidious because, under their terms, allowances are paid directly to the builder whose primary concern is the cost of construction, not the cost of operation. In the builders' interest in obtaining an immediate allowance, the consumer's choice between natural gas and electric energy is frustrated. Considerations of competitive choice in a free market are not permitted to come into play. Respondents utilize the monopoly power they

enjoy as to some uses of energy to improperly eliminate petitioner Columbus Gas Light from a substantial portion of the market in violation of the antitrust laws. *United States v. Griffith, supra; Northern Pacific Ry. Co. v. United States, supra; Fortner Enterprises v. United Steel Corp., supra.*

It is quite clear that the respondents' activities here in question are or, at least, could be found to be anticompetitive and predatory in their design to eliminate the competition of natural gas suppliers. The Courts below, however, held respondents' practices to be immune from antitrust sanctions and remedies under *Parker v. Brown, supra,* notwithstanding these considerations. But it is clear that the Supreme Court, in *Parker,* did not intend by its decision to exclude from the federal antitrust laws *all* state approved activities conducted by private parties. However, the Court's rulings below, if accepted, would provide antitrust immunity to *all* industries which are regulated by state agencies. Such a result is not sanctioned by *Parker v. Brown.* Indeed, many Supreme Court decisions have rejected this argument under circumstances similar to our present case. "The regulated industries are not *per se* exempt from the Sherman Act." *Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 456 (1945). More recently, the Court has stated:

> "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust laws and regulatory provisions." *Carnation Co. v. Pacific Westbound Conf.,* 383 U.S. 213, 217-218 (1966), quoting from *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-351 (1963).

In *Parker*, the Court observed that the prorate program

> ". . . was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the *legislative command* of the state and *was not intended to operate or become effective without that command.* We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to *restrain a state* or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, *an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.*" 317 U.S. at 350-1. (Emphasis added.)

There are many differences between our case and *Parker*. In the present action, petitioner is alleging that various *private* parties (suppliers of electricity) have combined and conspired in a plan designed to eliminate competitors (natural gas suppliers) from the market, or, at least, to suppress and reduce that competition through unfair and predatory practices in restraint of trade. (R. 3, 6.) Neither the Georgia Public Service Commission, nor any other state agency has approved of such a combination. So, even if such approval could immunize private conduct, which we deny, none was given as to those alleged activities. *Wainwright v. National Dairy Products Corp.*, 304 F.Supp. 567 (N.D. Ga. 1969).

Moreover, in our case, Columbus Gas Light is not attempting to restrain the state or its officers. Unlike the situation in the *Parker* case, our petitioner has not sued

or alleged any wrongdoing as against officials of the State of Georgia. Nor is there any attempt here to nullify the state's control over its officers.

But the most striking and, indeed, decisive difference between our case and *Parker* is that here the requested application of the antitrust laws to the challenged practices are *consistent* with Georgia policy favoring competition between natural gas and electrical utilities, whereas in *Parker*, the application of the antitrust laws would have frustrated both the California and national agriculture policies.

Clearly, *Parker v. Brown* does not confer antitrust immunity on all private business practices which are carried on under color of state action as the concept has been defined under the Fourteenth Amendment to the Constitution of the United States. An immunity of that nature would implicitly, but effectively, abrogate the antitrust laws. Thus, under the policy objectives of *Parker v. Brown*, a more specific question must be posed: would the application of the antitrust laws to the particular conduct of the respondents here involved do violence to the policies of the State of Georgia? The answer is, clearly, "no". Indeed, as demonstrated above the application of federal antitrust remedies as here sought to the practices here challenged would be most consistent with the policies of the State of Georgia.

One of the most enlightened lower federal court decisions interpreting *Parker v. Brown* is *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 298 F.Supp. 1109, 1111-1112 (D.Pa. 1969). Holding *Parker* ineffective to bar the action before it, the Court reasoned that the

extensive state regulation of the defendant did not constitute the type of "state action" which conferred antitrust immunity.

> "An analysis of the cases cited by both parties reveals that where a 'state action' exclusion from the scope of the Sherman Act has been sanctioned by the courts, a particular pattern emerges from the statute under which such action is taken. Not only does the legislature create the entity involved or endow it with governmental character, but *it also directs and authorizes that entity by means of the same statute to utilize anticompetitive means to achieve a specific governmental purpose.* For example, in *Parker v. Brown* . . . the California legislature not only created prorate raisin districts *but authorized them to limit production artificially* in order to correct adverse market conditions. Such behavior, if manifested without government direction, would be contrary to federal antitrust legislation. Similarly, in *Allstate Insurance Co. v. Lanier,* 242 F.Supp. 73, 361 F.2d 870 (4 Cir. 1966), a case upon which Defendant relies heavily as authority for its motion, the statute not only created the North Carolina Automobile Rate Administrative Office and provided for its regulation by the state insurance commissioner *but also expressly authorized price-fixing,* an activity proscribed under antitrust laws, in order to protect the people of North Carolina from excessive premiums. In *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52 (1 Cir. 1966) the Massachusetts legislature not only created the Massachusetts Port Authority, *but also endowed it with certain sovereign powers* (such as eminent domain) *and enabled the Authority to operate the Boston Airport as a monopoly.* On the other hand, no case cited by the parties nor discoverable

> through extensive research reveals any authority ascribing 'state action' immunity either to a private entity or to the transactions of a state agency which were *not mandated or directed by legislative enactment*. That regulation and supervision alone do not constitute a delegation of governmental authority is well established. *United States v. Utah Pharmaceutical Association*, 201 F.Supp. 29 (1962) . . . . Further, the Pennsylvania Non-Profit Hospital Plan Act is completely silent in matters that have to do with restraint of trade." (Emphasis added.)

See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Ashville Tobacco Board of Trade, Inc. v. FTC*, 263 F.2d 502 (4th Cir. 1959). And, in *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420 (3rd Cir. 1968), the Third Circuit Court of Appeals refused to consider a defendant immune from antitrust claims observing:

> "But it does not matter whether the practice was legal or illegal under state law if it was prohibited action under the Sherman Act. Certainly, it is not suggested that the rebate practice is required by state law. *Parker v. Brown* . . . ." (395 F.2d at 424.)

Even the cases relied upon by the Fifth Circuit Court below fail to support their enlargement of the *Parker v. Brown* immunity. In each of those cases, the immunity from antitrust sanctions was granted only because—as in *Parker* itself —the operation of free and open competition would have vitiated the important local interest which the states were attempting to advance. See, for example, *Allstate Ins. Co. v. Lanier*, 242 F.Supp. 73 (E.D. N. Car. 1965), aff'd 361 F.2d 870 (4th Cir. 1966), in which the

state legislature suspended some of the traditional notions of free competition in the insurance industry as a conscious and deliberate act on the grounds that competitive rate setting would not be in the public interest. In *Allstate,* as in *Parker,* the plaintiffs alleged that the state-established plan violated the federal antitrust laws. In both cases, suit was brought against public officials. And most importantly, in both cases had the plaintiff prevailed the entire state-established program would have fallen. A ruling for plaintiffs in *Parker* and *Allstate* would have required the federal courts to construe the antitrust laws to prohibit the states involved from suspending some aspects of free and open competition even though the respective *state legislatures had determined that open competition of the type plaintiffs there sought to pursue* would be harmful to the public interest.

In our present case, the Georgia legislature has given no specific mandate to the Public Service Commission directing or empowering it to order practices in restraint of trade and in violation of the federal antitrust laws; no direct authorization is given the Commission to order tying arrangements, discriminatory discounts and rebates, or the monopolization of the energy market, all of which practices respondents are allegedly pursuing in violation of the antitrust laws. Indeed the mandates contained in the Georgia Constitution and statutes cited above prohibit discriminatory rebates and encourage policies of free and fair competition within the context of the franchise monopolies granted.

Thus, this Court must grant certiorari herein in order to determine the future application of the *Parker v.*

Brown immunity, and the extent to which the federal antitrust laws will apply to competitive situations within the so-called regulated industries. Petitioner does not here seek to overturn *Parker v. Brown.* Nor does it seek to have the federal antitrust laws vitiate important local policies the achievement of which require that states expressly prohibit or suspend some principles of open competition. But petitioner urges this Court to recognize that *Parker v. Brown* was never intended to apply to a case such as our present one in which federal antitrust rules and policies are consistent with the objectives of the State in controlling the inter-relationships between two competitive suppliers of energy.

III. THE RULING BELOW ERRONEOUSLY CONVERTS ROUTINE STATE REGULATORY AGENCY APPROVALS INTO GRANTS OF ANTITRUST IMMUNITY AND THUS IMPLICITLY REPEALS THE DOCTRINE OF PRIMARY JURISDICTION.

Under the doctrine of primary jurisdiction, a dispute involved in an antitrust case which arises within a regulated industry and which could create a conflict between the antitrust court and the regulatory agency as to a matter within the agency's expertise, *e.g.*, rates, tariffs, *etc.*, should initially be "litigated" before the administrative agency. The preliminary administrative proceeding is thus available to educate the antitrust Court as to technical or complex industry considerations which may be pertinent. The antitrust Court thus has the benefit of the agency's expertise, but remains free to reach an independent and different conclusion. *Carter v. American Telephone & Telegraph,* 365 F.2d 486 (5th Cir. 1966).

The doctrine of primary jurisdiction is not, however, to be confused with the *Parker v. Brown* immunity. This is where the Court below seriously erred.

The Court of Appeals ruled—in effect—that merely because the dispute concerning respondents' rates and business practices were aired before the Georgia Public Service Commission, and merely because the Commission approved (or, really, failed to disapprove) those practices, that the activities of Georgia Power here challenged are *immune* from antitrust sanctions. That decision evidences a confusion between the concepts of primary jurisdiction and *Parker v. Brown* immunity and—if allowed to stand—would seriously impair and threaten the effectiveness of the future application of federal antitrust laws within any industry which is generally regulated or policed by a state agency. As such, administrative regulation would be substituted for anti-trust protection in all of the regulated industries, including those—as here involved—where competition is allowed and encouraged.

Moreover, the decision of the Fifth Circuit Court below is in serious conflict with the rulings by this Court on identical issues which have arisen in industries regulated by federal agencies. This Court has consistently recognized in cases such as *Carnation v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966) and *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) that administrative regulation of such governmentally created quasi-monopolies was not meant to supplant federal antitrust regulation except in those limited instances in which the government has deliberately and expressly prohibited some aspect of open competition thereby immunizing only those

specific private practices. Compare: *Parker v. Brown,* supra, and *United States v. Pan American Airways,* 371 U.S. 296, 305 (1963). No more extensive immunity can or should be articulated by the Courts. Accordingly, in *Carnation v. Pacific Westbound Conf., supra,* the Supreme Court stated:

> "We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render more general provisions of the antitrust laws wholly inapplicable to that industry."
> (383 U.S., at p. 218.)

Pursuant to this principle, this Court has ruled on numerous occasions that the antitrust laws could be applied against defendants in the regulated industries even though the conduct forming the basis of the antitrust claim had been approved by an administrative agency:

(a) *United States v. Radio Corp. of America,* 358 U.S. 334 (1959) (F.C.C. approval was a decision that defendants' conduct would not violate the "public interest, necessity or convenience" and had no bearing on subsequent civil antitrust action.)

(b) *California v. F.P.C.,* 369 U.S. 482 (1962) (F.P.C. approval of a merger did not confer antitrust immunity even though the F.P.C. had taken the competitive factor into account prior to passing upon the merger application.)

(c) *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963) (Bank merger approved in advance by U.S. Comptroller of Currency pursuant to an Act of Congress was held not to immunize such merger from the antitrust laws—even though the Comptroller duly considered the possible anticompetitive effects of the merger.)

(d) *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963) (Action taken by defendant pursuant to grant of authority from the federal Securities Exchange Act was held not immune from federal antitrust laws.)

See also, the same effect: *United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290 314-315, 17 S.Ct. 590 (1897); *United States v. Joint Traffic Ass'n,* 171 U.S 205, 19 S.Ct. 25 (1898); *Northern Securities Co. v. United States,* 193 U.S. 197, 24 S.Ct. 436 (1904); *United States v. Borden Co.,* 308 U.S. 188 (1940); *Georgia v. Pennsylvania R.R. Co., supra; Northern Pacific R.R. Co. v. United States,* 356 U.S. 1, 78 S.Ct. 514 (1958); *Maryland & Va. Milk Producers' Association v. United States,* 362 U.S. 458, 80 S.Ct. 847, 852-4.

In their opinions below, the District Court and Court of Appeals summarily rejected the relevance of these cases because they dealt with *federal* administrative agencies. The Courts failed to recognize that the policies and issues concerned are identical to our present case involving a state regulatory agency. The essential question relates to the extent to which administrative regulation supplants antitrust regulation and under what circumstances such administrative regulation will confer immunity from anti-

trust sanctions. The answer is clear. Immunity is created only in those limited instances where the legislature (state or federal) has found that open competition—as to certain specified practices—is not in the public interest and, therefore, the legislature commands the parties to pursue a specific course of otherwise anticompetitive conduct (*e.g.*, rate setting, division of markets, *etc.*)

In a few rare instances, Congress has specifically and expressly provided that certain types of federal administrative authorization will immunize conduct from antitrust sanctions. *Carnation v. Pacific Westbound Conference, supra; United States v. Pan American Airways,* 371 U.S. 296 (1963). But even here this Court noted that under regulatory schemes such as those supervised by the Federal Maritime Commission, the Civil Aeronautics Board and the Interstate Commerce Commission, grants of Congressional immunity were narrow and the antitrust laws are not completely displaced, 371 U.S. at p. 305. See, for example, the limitation read into the provision of the Civil Aeronautics Act by the Court of Appeals for the Second Circuit in *Transworld Air Lines v. Hughes,* 332 F.2d 602 (2nd Cir. 1964).

Parker v. Brown must be read as permitting the state legislatures to confer a similar immunity, and no more, only where they deem competitive practices to be contrary to the public interest. Simply stated, then, neither the existence of a regulatory administrative agency nor the approval by such an agency of the conduct of respondents herein may operate to immunize that conduct from scrutiny, under the federal antitrust laws. *United States v. Radio Corp. of America,* 358 U.S. 334 (1959).

If antitrust immunity has been consistently rejected in cases involving the federal regulatory agencies, it must be even more emphatically denied where mere state administrative action is involved. It is clear that federal legislation—such as that embodied in the antitrust laws—takes precedence over and pre-empts any conflicting state statute or administrative rule. Such is the command of the "Supremacy Clause" of the United States Constitution, Article VI, Section 2. However, taken to their logical conclusion, the rulings in our present case by the Courts below would permit a state legislative or administrative body to make rules which except certain conduct pursued by private corporations from the federal antitrust laws. It would accord *state* regulatory agencies with powers and authority which has been denied to *federal* regulatory agencies. The very idea that such state regulation could "pre-empt" Congressional legislation and *pro tanto* amend or repeal the national antitrust laws is patently absurd. See, for example, *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232 (1964). In *United States v. Radio Corp. of America, supra,* after examining the power delegated to the Federal Communications Commission by Congress, the Supreme Court ruled:

> "Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues, as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." (358 U.S. at p. 346)

This Court must grant the petition for Writ of Certiorari here sought by Columbus Gas Light in order to resolve the uncertainty as to the future application of the

antitrust laws created by the confusion on the part of the Court below in equating the doctrine of primary jurisdiction with the limited concept of antitrust immunity recognized in *Parker v. Brown*.

CONCLUSION

For the reasons stated above, the present petition for a Writ of Certiorari should be granted.

Dated, June 14, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States District Court,
M. D. Georgia,
Columbus Division.
May 14, 1970.

Civ. A. No. 1338.

Gas Light Company of Columbus,
Plaintiff,
vs.
Georgia Power Company and the Southern Company,
Defendants.

J. ROBERT ELLIOTT, District Judge:

This is an antitrust case brought by Gas Light Company of Columbus, a local distributor of natural gas in the Columbus, Georgia area, against Georgia Power Company, a state-wide electric utility engaged in the sale of electricity in the Columbus area, as well as other places, and against The Southern Company, a public utility holding company, and parent of Georgia Power. In broad terms, the complaint alleges violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1–2) and Section 3 of the Clayton Act (15 U.S.C. § 14) involving a nationwide conspiracy among electric utility companies to eliminate gas as an energy source competitive with electricity. The real gist of the complaint, however, is more specific. Plain-

tiff is attacking as antitrust violations the following alleged acts or practices:

(a) Utilization of the demand for underground installation of electric distribution lines as an opportunity to foreclose Plaintiff as a competitor by exclusive dealings and tie-in contracts;

(b) The use of various allowances for the purpose of increasing economic pressures upon builders to accept free or reduced-cost underground installations in return for the exclusive use of electricity for all competitive energy purposes;

(c) The establishment of preferential rates and allowances; and

(d) The placing of restrictive covenants in deeds for the sale of land.

In their answers, the Defendants specifically denied the allegations of the complaint charging antitrust violations and set up the defense, pursuant to F.R.Civ.P. 12(b) (6), of failure to state a claim upon which relief may be granted. Presently before the Court for disposition is the joint motion for summary judgment filed in behalf of both Defendants on September 11, 1969. This motion is predicated upon two separate and distinct grounds:

(a) That interstate commerce is not sufficiently involved to give this Court jurisdiction under the federal antitrust laws; and

(b) That the conduct complained of by Plaintiff is excluded from the scope of the federal antitrust laws by reason of the regulation thereof by the State of Georgia, acting through the Georgia Public Service Commission.

Because of the Court's ruling with respect to the second ground of the motion, it is not necessary to treat or deal with the first ground. Therefore, in the opinion which follows, the first ground will be disregarded.

The facts upon which Defendants' motion is based are contained in a "Stipulation of Counsel" dated August 1, 1969 and filed prior to Defendants' motion. Before dealing with the facts in any greater detail, however, it should be pointed out that the Stipulation contains a clear and succinct itemization of the practices which Plaintiff is challenging as antitrust violations. To quote:

> "Plaintiff contends that pursuant to a national conspiracy between investor owned utility companies which are members of the Edison Electric Institute and in furtherance of a unilateral plan and program to suppress or eliminate competition between itself and the plaintiff, defendant Georgia Power, acting at the instance and request of, and/or ordered or authorized by its parent Southern, did the following acts:
>
> "(a) Adopted and implemented Rate Schedule B–10–B which plaintiff contends is preferential because the 'qualifying load' consists of usages in which natural gas is competitive with electricity; plaintiff further contends that said Rate Schedule permits defendant to sell electricity for such competitive uses at less than its incremental cost;
>
> "(b) Adopted and implemented an Underground Residential Distribution Wiring Plan which plaintiff contends constitutes a means by which Georgia Power 'bribes' general contractors to construct totally electric subdivisions and/or apartments;
>
> "(c) (Adopted and implemented a Residential Wiring Plan, Rule G, which plaintiff contends is another

means of 'bribing' builders to go 'totally electric' in single family residences and apartments;

"(d) Adopted and implemented Rate Schedule TE–2 which 'budget billing' plan, plaintiff contends, has been misrepresented and misinterpreted to constitute a guaranteed flat charge for electricity;

"(e) Used restrictive covenants in land deeds which covenants required that any building or dwelling erected on deeded property be 'total' electric."

With respect to these contentions, the parties agreed in the Stipulation that certain facts may be taken as true and correct for the purposes of this Court's ruling. As a general matter, the parties agreed that under Georgia law, regulation of the rates and services of public utilities, such as Defendant, Georgia Power Company, is vested in the Georgia Public Service Commission and agreed that Georgia Power Company is obligated by law to comply with orders of the Public Service Commission as to rates and services. The parties further agreed that all of the matters complained of by the Plaintiff, with the exception of the restrictive covenants, sub-paragraph (e) above, are subject to regulation by the Georgia Public Service Commission and that each of the challenged practices has been the subject of extensive hearings before the Public Service Commission upon complaints of Plaintiff, Atlanta Gas Light Company, and others. Finally, the parties agreed that in these hearings Plaintiff and Atlanta Gas Light Company offered a number of witnesses, including experts, and presented documentary evidence.

Further, the parties agreed to certain facts regarding each of the challenged practices enumerated above, which will now be outlined in some detail.

Georgia Power Company's Rate Schedule B–10–B is a general service rate, available to any customer who qualifies. It is used generally by commercial customers and has been in effect since 1933 with subsequent amendments, all pursuant to orders of the Georgia Public Service Commission.

Rate Schedule TE–2 is a rate for homeowners whose primary source of energy is electricity. It appears that this rate provides for budget billing, which means that the annual bill is estimated and paid in twelve equal installments, with an adjustment at the end of the year based on actual usage. This Rate Schedule was first used on January 1, 1965, pursuant to an order of the Georgia Public Service Commission.

Both B–10–B and TE–2 were the subject of an attack by Plaintiff and Atlanta Gas Light Company, another natural gas distributor, in extensive hearings before the Georgia Public Service Commission entitled:

> "In Re: Georgia Power Company, File Nos. 19314, 19367, 19462, Docket No. 2027–U (Re: Investigation of Rates, Promotional Practices and Allowances of Georgia Power Company, Atlanta Gas Light Company and Gas Light Company of Columbus)."

Public hearings commenced March 21, 1967 and continued through September 1, 1967. The record before the Commission comprised 1,623 pages of testimony and cross examination thereon and a very substantial number of exhibits. At the time the Stipulation was filed, the Public

Service Commission had not issued an order on that investigation. Subsequent to the filing of the Stipulation, but before oral argument on the present motion, an order was issued by the Commission, dated November 25, 1969, relating not only to B–10–B and TE–2, but to other challenged practices as well. More will be said about this order later.

With respect to Underground Residential Distribution, the Stipulation states that Defendant, Georgia Power Company, will provide underground systems of electrical connections for homes and apartments as an alternate to the usual overhead system, even though the cost of underground is in most cases in excess of the cost for overhead distribution facilities. Georgia Power Company filed with the Georgia Public Service Commission in 1967 its application for approval of its proposed plan for obtaining reimbursement of this excess in cost. Plaintiff and Atlanta Gas Light Company entered their objections to the proposed plan. Public hearings were thereafter held by the Commission on Georgia Power's plan, as well as on the objections filed by the gas companies. The Commission issued an order on June 28, 1968 (attached to the Stipulation as Exhibit C) disapproving and disallowing the plan submitted by the Georgia Power Company. In lieu of the proposed plan, the Commission devised a plan of its own and ordered the Power Company to follow it. This order states in part:

> "WHEREFORE IT IS ORDERED: That the plan submitted on November 14, 1967 by Georgia Power Company be and the same is hereby disallowed.

"ORDERED FURTHER: That Georgia Power Company shall obtain a contribution in aid-of-construction * * *

"ORDERED FURTHER: That Georgia Power Company will redeem the certificate held by the property owner * * *

"ORDERED FURTHER: That Georgia Power Company shall calculate the contribution in aid-of-construction * * * and file the same with the Commission for specific approval."

Subsequently, on motions for reconsideration, another order entitled "First Amendatory Order" was issued on November 18, 1968. This order is attached to the Stipulation as Exhibit D. The Commission again disallowed the original plan submitted by Georgia Power Company and "ordered" Georgia Power Company to adopt and comply with a plan substituted by the Commission. According to the Stipulation, Atlanta Gas Light Company is presently appealing these decisions of the Georgia Public Service Commission to the Superior Court of Fulton County, Georgia; but, for some reason, Plaintiff did not choose to exercise its right to a court review of the Commission's orders.

The Residential Wiring Plan of Defendant, Georgia Power Company, Rule G, is a plan inaugurated by Georgia Power Company on January 1, 1960, pursuant to an order of the Georgia Public Service Commission. In 1961, an attack was made upon this wiring plan and public hearings were held before the Georgia Public Service Commission. While neither Plaintiff nor Atlanta Gas Light Company were parties, officials of both companies

testified against the plan. The Commission upheld the plan by order dated August 29, 1961. In its four page decision, attached to the Stipulation as Exhibit E, the Commission found that the Residential Wiring Plan was "in the best interest of the general public and should, therefore, remain in effect." Whereupon, the Company was ordered to follow the plan as filed and in a subsequent order dated December 19, 1962 (attached to the Stipulation as Exhibit F), the plan was extended for another ten-year period.

The Stipulation contains information regarding the restrictive covenant attacked in sub-paragraph (e) of Plaintiff's contentions as set forth above. Subsequent to the filing of the Stipulation, the Supreme Court of Georgia rendered a decision invalidating this restrictive covenant on grounds of state law. Gas Light Company of Columbus v. Georgia Power Company, 225 Ga. 851, 171 S.E.2d 615 (1969). As already pointed out, no contention was made that this conveyance was subject to regulation by the Georgia Public Service Commission, and, since this decision is being confined to conduct that is so regulated, this will be discussed no further.

Reference has already been made to a decision of the Georgia Public Service Commission dated November 25, 1969, relating to Georgia Power's Rate Schedules B–10–B and TE–2, as well as to its Residential Wiring Plan. That order was quoted extensively during oral argument on the motion. In this order the Commission held that Rate Schedule TE–2 is "just, fair and equitable for the residential classes of service" and "ORDERED * * * that Rate Schedule TE–2, as presently authorized, be retained

in [its] present form." The Commission also found that the Residential Wiring Plan should "not be disturbed at this time" and "ORDERED FURTHER: That Georgia Power Company Residential Wiring Plan, as approved in Docket No. 1614–U which is now a part of the General Rules and Regulations for Electric Service, be retained and continued in force until January 1, 1973, at which time said Wiring Plan shall be terminated." Finally, the Commission held that Georgia Power Company's Rate Schedule B–10–B "is impractical in its application" and "ORDERED FURTHER: That Georgia Power Company General Service Rate Schedule B–10–B be revised" in a manner prescribed by the Commission.

It is interesting to note that in each of the Public Service Commission decisions referred to above there is a paragraph to the effect that "jurisdiction over this proceeding is expressly retained for the purpose of entering any further order or orders as this Commission may deem mete and proper." The Court construes this provision of each order as meaning that the Commission does expressly reserve jurisdiction in an attempt to insure the general public, as well as the competitors of Georgia Power Company, of the Commission's availability to review any of the plans at any time and to modify, alter or terminate any of the plans should the Commission determine that such action would be in the public interest.

Turning now to legal issues, the question for determination is whether the regulation, as set forth above, by the State of Georgia, acting through the Georgia Public Service Commission, of the practices under attack, is

sufficient to exclude them from the scope of the federal antitrust laws.

The principal case cited by Defendants in support of the affirmative of this proposition is Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, decided by the United States Supreme Court in 1943. In that case the State of California had set up administrative machinery to control the harvesting and marketing of agricultural commodities. Specifically, the case involved a proration plan for raisin growers and distributors which restricted competition among growers and maintained prices to packers. Directing itself to the attack made that the plan was in violation of the Sherman Act, the court assumed that the plan "would violate the Sherman Act if it were organized and made effective solely by virtue of a contract combination or conspiracy of private persons, individual or corporate." The Court held, however, that the Sherman Act does not apply to state approved action:

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations [§ 7], and it authorizes suits under it by persons and corporations [§ 15]. A state may maintain a suit for damages under it, Georgia v. Evans, 316 U.S. 159 [62 S.Ct. 972, 86 L.Ed. 1346], but the United States may not, United States v. Cooper Corp., 312 U.S. 600 [61 S.Ct. 742, 85 L.Ed. 1071]—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combination.' 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." 317 U.S. at 350–351, 63 S.Ct. at 313.

Gas Light Company of Columbus attempts to distinguish *Parker* by characterizing the immunity as limited to conduct performed by agents of the state government at the specific command of the state legislature. In addition, Plaintiff contends that where, as here, there is any private action in the preparation or submission of plans for approval, *Parker* does not apply. Both of these arguments are without merit. As to the first, immunity was in fact accorded those private individuals in *Parker* who acted pursuant to the state's command. As to the second argu-

ment, the Supreme Court in *Parker* rejected the claim that the plan violated the Sherman Act because it required approval by a referendum of producers as well as the State Commission, and because the plan was initiated by request of a group of prominent producers, rather than the state. 317 U.S. at 352, 63 S.Ct. 307. Finally, Plaintiff quotes the following language from the Court's opinion in *Parker:*

> "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Company v. United States, 193 U.S. 197, 332 [344–347, 24 S.Ct. 436, 454, 459–461, 48 L.Ed. 679] * * *." 317 U.S. at 351, 63 S.Ct. at 314.

In *Northern Securities* the contention was made that the defendant corporation was exempt from the antitrust laws because it had obtained a charter from the state and because its actions were within the charter authority. The Court summarily rejected this argument and held that simply because the state had issued a corporate charter, it could not immunize the chartered corporation from all federal statutory control. Applying the quoted language to the case at bar, just because an industry is regulated or because a regulatory scheme has been set up by the state, the antitrust laws will not automatically be disregarded. No contention has been made by Defendants that the antitrust laws are impliedly repealed as to their conduct just because Georgia Power Company is a regulated public utility. To the contrary, the Defendants are claiming that the specific practices which are being attacked are the result of legislative action by the state and thus within the *Parker* immunity. The Supreme Court of Georgia has said:

> "As we have previously noted, when the commission establishes a rate, such act is legislative in character, and binds all parties concerned in the same manner as if the rate had been fixed by an act of the General Assembly." Ga. Public Service Commission v. Atlanta Gas Light Company, 205 Ga. 863, 883, 55 S.E.2d 618, 630 (1949).

In other words, it is the conduct under attack for which immunity is being sought—not the corporate person of Georgia Power Company. Viewing the matter in this light, Plaintiff is really attacking the orders of the Georgia Public Service Commission

An examination of subsequent cases demonstrates a consistent pattern of the application of the *Parker* principle and indicates that the case is still viable. In 1966, the Fourth Circuit Court of Appeals, in Allstate Insurance Co. v. Lanier, 361 F.2d 870, gave consideration to an attack by several insurance companies upon a law of the State of North Carolina which required the companies to belong to a bureau of private persons which fixed rates and submitted them to the state for approval. The basis of the attack was that such a plan violated the Sherman Act. The District Court held, 242 F.Supp. 73 (1965), on the basis of Parker v. Brown, supra, that the activity in question was exempt because of the action of the state. The District Court found that the fact of the bureau being made up of private individuals, and not government officials, made no difference, since the bureau was answerable to the State Commission. On appeal, the Fourth Circuit stated:

> "The District Court's finding in the present case that the North Carolina Rating Bureau was operated under the active supervision of the state is not chal-

> lenged in this court, and we find no merit in the distinction suggested by appellants between the injunction sought in Parker v. Brown and the declaration of pre-emption sought here. The essential question in both cases is whether a program of regulations established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of Parker v. Brown, the North Carolina statutory plan is clearly valid."

E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 1 Cir., 362 F.2d 52 (1966), is a similar restatement of the *Parker* doctrine. In that case, the defendant Port Authority had granted to one operator the right to operate an airport in Boston, and the plaintiff charged that the effect of this practice was to put him out of business. Again, it was held that:

> "What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at private action, not governmental action."

In Sun Valley Disposal Co., Inc. v. Silver State Disposal Co., 420 F.2d 341 (1969), the Court of Appeals for the Ninth Circuit affirmed the grant of a motion for summary judgment where a county commissioner, pursuant to state legislation, issued an exclusive franchise for garbage pickup to a competitor of the plaintiff. Granting that the arrangement would violate the Sherman Act if applicable, the Court held that the federal antitrust laws do not apply to exclusive arrangements made by local governments under the authority of state laws, even where they are anti-competitive. *Parker* was relied upon in Wainwright v. National Dairy Products Corp., 304 F.Supp. 567 (1969), decided by the District Court for the North-

ern District of Georgia. The Court held that the Milk Control Act of Georgia, to the extent that it fixed prices at which milk could be sold in Georgia, could immunize an alleged conspiracy under the federal antitrust laws to fix milk prices. In commenting on Parker v. Brown, the Court said:

> "We feel that the actions of the Georgia Milk Commission constituted state action, within the meaning of Parker v. Brown. See, also, Allstate Ins. Co. v. Lanier, 242 F.Supp. 73 (E.D.N.C. 1965), aff'd. 361 F.2d 870 (4th Cir. 1966), cert. denied, 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212. The Georgia Milk Commission functioned as a state agency within the Georgia Department of Agriculture. An elected state official, the Commissioner of Agriculture, appointed the chairman of the Milk Commission, fixed his compensation, and had dismissal power over him. Ga.Code § 42–525. The salary of the chairman was paid out of the general treasury of the State of Georgia. Under Ga.Code § 42–559, the chairman was charged with securing compliance with the Act. In addition to the chairman, a consumer member of the Commission was appointed to the board by an elected state official, the Governor, Section 42–525. After Gregory v. Hamilton, 215 Ga. 735, 113 S.E.2d 395 (1960), changed the method by which the Commission was financed, under Ga.Code § 42–548, all fees collected by the Commission were paid into the general fund of the state treasury and appropriations for its daily operations came from the General Assembly as part of the regular budget of the Department of Agriculture. The Act itself sets the maximum compensation members of the Commission could receive and provided the same travel and subsistence allowance for them as for other state officers and employees. Section 42–525.

> "Sanctions were afforded to enforce the provisions of the Act, e.g., §§ 42–544, 42–913, 42–532. Moreover, the General Assembly set strict standards to guide establishment of the Commission's price recommendations, § 42–554, full hearings were required for the revision of prices, and judicial review was provided. § 42–555.
>
> "In short, the state's hand ran throughout the statutory scheme: in the manner in which some of the Commission members were appointed, in the State Agriculture Commissioner's ultimate power over the chairman, who was the moving force in many of the Commission's actions, in placement of the Commission within the state bureaucracy, and in subjection of the agency to judicial review, to strict guidelines, and presumably, to duties imposed on other state agencies." 304 F.Supp. at 574.

Finally, *Parker, Wiggins* and *Sun Valley Disposal* were cited by Judge William B. Jones, of the District Court for the District of Columbia, in Hecht v. Pro-Football, Inc., 312 F.Supp. 472 (decided April 16, 1970), in sustaining the Defendant's motion for summary judgment in a Sherman Act complaint wherein it was charged that a long term lease of a football stadium was an unreasonable restraint on competition. Pointing out that legislation had created the lessor Board and had conferred upon it broad powers to construct and operate a stadium, the Court concluded that "the leasing of the stadium was pursuant to the mandate of the Act and was governmental action. * * * No violation of the [Sherman] Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action."

The Court is of the opinion that the principles of law set forth in the cases above, as applied to the specific facts of this case, demand the conclusion that the regulation by the State of Georgia, acting through the Georgia Public Service Commission, of the practices which have been challenged as antitrust violations, is sufficient to exclude these challenged practices from the scope of the federal antitrust laws, for the reasons hereinafter set forth.

The Constitution of the State of Georgia, Article IV, Section I, Paragraph I, provides:

> "The power and authority of regulating * * * charges of public utilities for their services, of preventing unjust discriminations, and requiring reasonable and just rates * * * and of charges of public utilities, are hereby conferred upon the General Assembly, whose duty it shall be to pass laws from time to time, to regulate such tariffs and charges, to prohibit unjust discriminations by the various * * * public utilities of this State, and to prohibit * * * public utilities from charging other than just and reasonable rates and to enforce the same by adequate penalties. * * *"

In addition, Article IV, Section IV, Paragraph III, of the Constitution states:

> "There shall be a Public Service Commission for the regulation of utilities, vested with the jurisdiction powers and duties now provided by law or that may hereafter be prescribed by the General Assembly, not inconsistent with other provisions of this Constitution. Such Commission shall consist of five members, who shall be elected by the people. A chairman shall be selected by the members of the Com-

> mission from its membership. * * * The qualifications, compensation, filling of vacancies, manner and time of election, power and duties of members of the Commission, including the chairman shall be such as are now or may hereafter be provided by the General Assembly."

Subsequently, the Georgia General Assembly enacted into law all those things contemplated by the preceding constitutional provisions. These laws created the Georgia Public Service Commission, prescribed the number of commissioners, their election and terms of office, their qualifications, the oath of office, the method of filling vacancies, the method of electing a chairman, and providing for his term of office and salary, and prescribed the salaries to be paid each commissioner, and required that such compensation be paid from the Treasury of the State of Georgia. Ga. Code, §§ 93–201 through 93–208. By § 93–304 the powers and duties conferred upon the Public Service Commission were extended to include gas and electric light and power companies. By § 93–307 the Public Service Commission was given general supervision of all utilities, including gas or electric light and power companies, and the Commission was given authority to require such utilities to establish and maintain such facilities as may be reasonable and just; to examine the affairs of such companies and to be informed as to their general condition and capitalization, their franchises and the manner in which their properties are managed, conducted, or operated. The Georgia Legislature further provided that "the power to determine what are just and reasonable rates and charges is vested exclusively in the

Public Service Commission." In Georgia Code §93–416, it is provided that should any utility subject to the supervision of the Georgia Public Service Commission fail, omit or neglect to obey, observe and comply with any order, direction or requirement of the Commission, it "shall forfeit to the State a sum of not more than $5,000 for each offense, the amount to be fixed by the presiding judge. Every violation of the provisions of this section or any other section, or of any such order, direction or requirement of the Public Service Commission shall be a separate and distinct offense, and in case of a continued violation, every day a violation thereof takes place shall be deemed a separate and distinct offense. * * *" Further, in § 93–417 of the Georgia Code it is provided that "the penalties prescribed by this Chapter and the procedure to enforce the same are made applicable to any and all violations of the rules, orders and regulations established by the Public Service Commission." Finally, the General Assembly has enacted legislation providing that every agent or employee of any public utility subject to the jurisdiction of the Georgia Commission who shall violate or procure, aid or abet any violation, or who shall fail to obey, observe or comply with any order of the Public Service Commission shall be guilty of a misdemeanor and shall be subject to prosecution in any county in which the company operates. Ga. Code, § 93–9901.

It is difficult to imagine a more comprehensive statutory scheme of regulation. Certainly, the hand of the state runs throughout every twist and turn of it. As already discussed in detail, each one of the challenged practices was the result of an order of the Georgia Public Service

Commission—regardless of how the practices might have been proposed or initiated and regardless of the manner in which Commission approval was sought—and in each instance the practices were the subject of further orders changing, modifying, altering, in some cases terminating, in some cases approving and in other cases disapproving, the plans as submitted or as carried out. In the case of Underground Residential Distribution, for example, the plans as submitted by Georgia Power Company were disallowed, and the Commission dictated the manner in which the rates and services would be provided. Therefore, it is clear that the practices in question in this case were not the product of individual agreement or combination. Rather, they were the product of a legislative command of the state. Clearly, they could not have become operative or effective without that command. For this Court to hold otherwise would place the Defendants on the classic "horns of a dilemma." Without *Parker* immunity, a public utility, such as Georgia Power Company, would be placed in the anomalous position of choosing between two conflicting laws—if the utility were to obey a Commission order it might thereby subject itself to treble damage liability under the antitrust laws; but if it chose not to obey the Commission order, relieving itself from antitrust liability, it would then be subject to criminal penalties under the laws of Georgia.

To apply the principles of antitrust law to activities of a regulated public utility which are carried out pursuant to an order of the state would be to defeat the very purpose of state regulation. The effect, in short, would be to render the activities of state regulatory

agencies nugatory. The Court is of the opinion that Congress, in enacting the Sherman Act, recognized this difficulty and drafted the act in such a manner so as to apply only to private individuals and entities. This is what is recognized in Parker v. Brown; and this is what should control the case at bar.

The other arguments made by Plaintiff do not affect this result. Plaintiff relies on a number of antitrust cases dealing with federal agencies.[1] Those cases all concern the relationship between federal agencies and the federal courts in matters of antitrust enforcement, and the decision in each one is based upon a conclusion as to the manner in which Congress has chosen to delegate responsibility for antitrust enforcement between the agencies and the courts. Therefore, such cases do not apply here. In addition, Plaintiff cites the recent decision of Judge Oren R. Lewis, of the Eastern District of Virginia, in Washington Gas Light Company v. Virginia Electric and Power Co., 309 F.Supp. 1119 (decided January 30, 1970). In that case, Judge Lewis held that an Underground Residential Distribution Plan being used by Virginia Electric and Power Company violated Section 1 of the Sherman Act and Section 3 of the Clayton Act. The Court found that the plan amounted to an illegal tying arrangement and that, as such, it was a *per se* violation of the antitrust laws. The curious thing about the opinion is the Court's assumption that underground residential

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[1]Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); United States v. Radio Corp of America, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959); California v. F. P. C. 369 U.S. 482, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962); United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); and others.

distribution and electricity are two separate products, so that one can be tied to the other as computer cards were tied to IBM machines in International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936). To my mind, Underground Residential Distribution is merely a method by which a product —electricity—is delivered to the consumer. It might be compared to a department store's delivery of merchandise bought by a customer living fifteen miles out in the country—if that customer bought a single necktie it is doubtful the store would treat the delivery the same way it would if the customer bought a wardrobe. Underground Residential Distribution is ancillary to both the seller and buyer of the product, in much the same way as a free meal given to an airline passenger is ancillary to the sale of an airline ticket. Therefore, it is difficult to see how there could be a separate tying product in the commercial sense, or how such a case could be fit within the tying clause concept.[2] At any rate, a careful reading of Judge Lewis' decision shows that no serious claim of state action was ever made in the *Washington Gas Light* case to the effect that the Virginia State Corporation Commission had approved and ordered into effect the Underground Wiring Plan contested in that case. Thus, the decision of the Virginia court, while interesting, sheds no light on the issue which is now before this Court and is really irrelevant.

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[2]For a very interesting discussion of this problem, see the article by Donald I. Baker, Chief, Evaluation Section, Department of Justice, entitled "Another Look at Franchise Tie-Ins After Texaco and Fortner." The Antitrust Bulletin, Volume XIV, Winter, 1969, page 767.

For the reasons stated above, the motion for summary judgment in behalf of Defendants, Georgia Power Company and The Southern Company, is hereby sustained with respect to each of Plaintiff's contentions as set forth in the Stipulation of Counsel, with the exception of the restrictive covenant referred to in sub-paragraph 2(e) thereof.

Appendix B

In the United States of Appeals
for the Fifth Circuit

No. 30091

Gas Light Company of Columbus,
Plaintiff-Appellant,

vs.

Georgia Power Company and
The Southern Company,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(March 23, 1971)

Before BELL, DYER, and RONEY, Circuit Judges.

BELL, Circuit Judge: This appeal presents an important question in drawing the balance between state action excluded from the federal antitrust laws under the aegis of *Parker v. Brown,* 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed 315, on the one hand, and includible non-state action activity on the other, in the field of state regulated public utility monopolies. The case comes to us on an appeal by plaintiff from a summary judgment entered for defendants on a stipulation of facts which is full and complete for the purposes of the issue presented. We affirm.

Plaintiff, Gas Light Company of Columbus, is the sole distributor of natural gas in the Columbus, Georgia area. Its rates and services are regulated by the Georgia Public Service Commission. The defendants are Georgia Power Company, an electric utility engaged in the sale of electricity in the Columbus area and in most of Georgia. It also is a Georgia Public Service Commission regulated monopoly, being the sole supplier of electricity in its territory of operation. The parent corporation of Georgia Power Company, the Southern Company, is likewise a defendant. Others are charged as co-conspirators but are not named as parties defendant. The complaint alleged violations of §§ 1 and 2 of the Sherman Act, 15 USCA, §§ 1 and 2, and 3 of the Clayton Act, 15 USCA, § 14.[1] The violation is said to arise from a nationwide

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[1] 15 USCA, § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ."

15 USCA, § 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

15 USCA, § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding

conspiracy among electric utilities to eliminate natural gas as a competitive energy source. Treble damages and injunctive relief are sought.

I.

The claimed conspiracy rested on specified acts and practices charged to Georgia Power and allegedly ordered by the Southern Company. In considering these acts and practices, we must have in mind that gas is not competitive with electricity in certain aspects such as in lighting generally, and in the operation of small household appliances and the like. Gas is competitive with electricity for use in operating furnaces and space heaters, air conditioners, water heaters, stoves, refrigerators and clothes driers. There is vigorous competition between the electric and gas industry for this latter type of business.

There are five acts and practices charged as a basis for the antitrust violations. One of these was not considered in the district court and will not be considered here except to state that it charged Georgia Power with placing a restrictive convenant, requiring all-electric building use, in a deed conveying 30 acres of land. This restrictive covenant was later held invalid by the Supreme Court of Georgia. *Gas Light Company of Columbus v. Georgia Power Company,* 1969, 225 Ga. 851, 171 S.E.2d 615. At any rate, this claim still resides in the district court. The summary judgment which forms the subject matter of this appeal, taken pursuant to Rule 54(b), F.R.Civ.P., and 28 USCA, § 1291, eliminated each of the other acts and practices from the case as bases

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may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

for recovery. Each involved rate and service matters which had been considered by the Georgia Public Service Commission in due course.

These acts and practices are as follows:

Rate Schedule B-10-B

This is a general service rate in effect since 1933 with subsequent amendments. The charge reduces as the load increases. Plaintiff urges that this rate schedule is preferential because the increased usage to obtain decreased rates involves usages which compete with gas. This argument rests on the idea that the captive market for electricity (lighting, small appliances) requires only low usage and thus the decreased rates apply to those high use areas where gas and electricity compete. Plaintiff also claims that the rate permits Georgia Power to sell electricity at less than its incremental costs.

Rate Schedule TE-2

This is a budget billing plan for homeowners whose primary source of energy is electricity and whereunder the annual electric bill is estimated and divided into twelve equal installments with an adjustment at the end of the year based on actual usage. This schedule has been in effect since 1965 pursuant to an order of the Commission. Plaintiff claims that this rate schedule is misrepresented to constitute a guaranteed flat charge for electricity.

Underground Residential Distribution Wiring Plan

This rate came about in 1967 by reason of the Federal Housing Authority requiring underground wiring in new

subdivisions. Plaintiff contends that Georgia Power uses it to bribe contractors to construct totally electric subdivisions and apartments. This stipulation demonstrates that Georgia Power requires the contractor to pay a part of the cost of underground wiring. It can be argued, however, that the effect is that Georgia Power pays a part of the cost since each pays a part and Georgia Power pays more if electric heat is to be used. The plan offered by Georgia Power was rejected by the Commission which then promulgated its own underground wiring distribution plan and charge.

Residential Wiring Plan, Rule G

This again is a rate schedule which plaintiff contends was adopted for use in bribing builders to go totally electric in home and apartment construction. This schedule was implemented in 1961 pursuant to an order of the Commission but was revised by the Commission in 1962 after hearings. Under it Georgia Power makes a promotional payment of $50.00 to $180.00 per unit if residences or apartments are wired for electric range and electric water heater, dryer or space heating.

Each of these acts and practices are rate schedules and each has been considered by the Georgia Public Service Commission in an adversary proceeding. Each is effective by order of the Commission. In addition, B-10-B, TE-2 and Rule G were the subject matter of further extensive hearings on the complaint of plaintiff and Atlanta Gas Light Company beginning in 1967 with the result of a further order of the Commission relative to each being entered in 1969. TE-2 and Rule G were left in effect but Georgia Power was ordered to revise B-10-B

in a manner prescribed by the Commission. Moreover, the Commission retains jurisdiction with respect to each of the rate schedules for entering such other and further orders as the Commission may deem proper.

II.

The question presented is whether the court below erred in holding that these rate schedules were the products of state action, i.e., products of the Georgia Public Service Commission, and as such, excluded from the proscription of the federal antitrust laws under the teaching of *Parker v. Brown,* supra.

We turn then to *Parker v. Brown* which is the benchmark in the consideration of the issue presented. As will be seen, a frame of reference is established by it and some of the decisions which have followed it.

In *Parker v. Brown,* a raisin producer brought an action to enjoin a state official and other state agents from enforcing a California raisin marketing prorate program instituted pursuant to a California statute. The intent of the program was to supplant chaotic competition between farmers with centralized marketing plans. The statute set up an agricultural advisory commission, composed of state officers, which was empowered to authorize creation of a prorate plan and appoint a committee upon the petition of raisin producers. The committee was authorized to administer the program, subject to supervision by the commission.

As adopted, the raisin program was designed to regulate the harvesting and marketing of raisins in California, and the price at which the various grades of raisins

would be sold by producers to packers. Plaintiff attacked the program under §§ 1 and 2 of the Sherman Act. The Supreme Court assumed that the plan "would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination of conspiracy of private persons, individual or corporate." 317 U.S. at 350. The court stated, however, that the Sherman Act is not directed at restraining acts of the state as directed by its legislature. While conceding that the plan had many private characteristics, the court concluded in holding for the defendants that "it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the exercise of a governmental policy." 317 U.S. at 352.

Although the Supreme Court has not decided subsequently a case similar on its facts, the continuing vitality of the *Parker* exclusionary rationale is demonstrated by the decisions of the court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 1961, 365 U.S. 127, 5 L.Ed.2d 464, 81 S.Ct. 523, and in *United Mine Workers v. Pennington,* 1965, 381 U.S. 657, 14 L.Ed.2d 626, 85 S.Ct. 1585. In these cases the court held that joint efforts to influence public officials in the passage of laws were not within the scope of the antitrust laws. Meanwhile there have been several federal decisions which explicate the *Parker v. Brown* holding in varying factual contexts and which bear on the issue before us.

In *Allstate Ins. Co. v. Lanier,* 4 Cir., 1966, 361 F.2d 870, the court affirmed the dismissal by the district court of an antitrust action brought to enjoin the North Carolina system of regulating automobile insurance rates. The state maintained a system under which uniform rates and

standards were promulgated at the initiative of a rating bureau, composed of the insurance companies, subject to approval by the Commissioner of Insurance. In holding that *Parker* immunity applied, the court said that North Carolina's program qualified as a product of state action because it was "under the active supervision of the state", even though the rates were of private origin. 361 F.2d at 872. See also *E. W. Wiggins Airways, Inc. v. Mass. Port Authority,* 1 Cir., 1966, 362 F.2d 52.

The other side of the coin may be seen in *Asheville Tobacco Board of Trade v. Federal Trade Commission,* 4 Cir., 1959, 263 F.2d 502. There the facts were that a North Carolina statute authorized the creation of local Tobacco Boards of Trade for the purpose of making rules and regulations relative to handling the sale of tobacco at auction. The Boards of Trade made their own rules and regulations and operated without regulation or supervision by the state. Although remanding the case to the Federal Trade Commission for reconsideration of other questions, the court concluded that the activity on the part of the defendant Board of allocating selling time in tobacco warehouses was not precluded from antitrust regulation by *Parker v. Brown.* The distinction was that the activity was individual or private on the part of the Board as distinguished from state action.

In *Woods Exploration & Producing, Inc. v. Aluminum Co. of America,* 5 Cir. 1971, ___ F.2d ___ [slip opinion dated January 5, 1971, Nos. 28,763 and 29,487], we refuse to characterize as state action the regulation of production of natural gas by the Texas Railroad Commission, since plaintiffs alleged that defendants filed false information with the Commission. We held that such

"actions taken to subvert the Commission scheme for anticompetitive purposes are subject to the strictures of the antitrust laws." Supra at 37. Such fraudulent conduct by regulated companies did not fall under the cloak of the state action concept of *Parker v. Brown.*[2] Unlike the situation in *Woods Exploration,* here we have no claim that the Georgia Power filed false information with the Commission or otherwise engaged in fraudulent conduct.

And, unlike the situation in *George R. Whitten, Jr. v. Paddock Pool Builders, Inc.,* 1 Cir. 1970, 424 F.2d 25, we deal with state regulated monopolies and not with an activity wherein the state required competitive bidding. In *Whitten,* the conduct which formed the basis of the antitrust complaint had to do with the adoption by public officials of defendant Paddock's specifications for swimming pools and related equipment thereby excluding competitors in a market where competitive bidding was required. The court found this conduct to be outside the *Parker* exclusion.

This brings us to *Washington Gas Light Co. v. Virginia Electric & Power Co.,* 4 Cir., ___ F.2. ___ [slip opinion dated February 12, 1971, No. 14,605], a case somewhat similar to our own. There plaintiff attacked defendant VEPCO's "underground residential distribution" practice or service, a service much like Georgia Power's here, as a violation of the antitrust laws. The

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[2]The factual situation in *Trucking Unlimited v. California Motor Transport Co.,* 9 Cir., 1970, ___ F.2d ___ [slip opinion dated October 5, 1970, No. 22,462], is akin to the fraudulent information aspect of *Woods Exploration* in that the gist of the anticompetitive conduct there charged was an abuse of the processes of the regulatory commission and courts in contesting the certificate applications of competitors.

district court agreed, holding that the practice was a per se violation of the Sherman Act as an illegal tying arrangement, and also a violation of the Clayton Act as an exclusive dealing arrangement. The district court did not consider the question of the practice being excluded from the reach of the antitrust laws by *Parker*. The Fourth Circuit reversed, holding the *Parker* exemption applicable although the State Corporation Commission made no investigation and gave no approval to the VEPCO practice in question. The court preferred to infer that silence meant approval of the plans, and that there was therefore state action. Stressing that the Commission "possessed adequate regulatory powers to stop the power company if it chose to do so", supra at 10, the court concluded:

> "We think VEPCO's promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these practices exempt from the application of the laws of antitrust under the *Parker* doctrine." Supra at 10.

In the instant case, it is unquestioned that the Georgia Public Service Commission has the power to regulate the rates and practices of public utilities in Georgia. Ga. Const., Art. IV, § I, ¶ I; Art. IV, § IV, ¶ III. See Ga. Code Ann. §§ 93-304, 307 and 309. Here, as stated, the Commission has been anything but silent concerning these practices of Georgia Power; thus under the *Washington Gas Light* holding, the *Parker* exclusion would apply in the instant case.

However, it is not necessary for us to extend the *Parker* exclusion to the point of its extension in *Washington Gas Light* and we do not do so. As we have seen

above, the Commission here gave lengthy consideration to each of the practices and rates under attack, and after full adversary hearings ordered them into effect, some with major modifications. Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. Though the rates and practices orginated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission. They are thus immune from the operation of the antitrust laws under the *Parker* exemption.

It is to be added that as products of the Commission they are state activity as distinguished from mere private action subject to the antrust regulation under the admonition of the court in *Parker* that ". . . a state does not give immunity to those who violate the Sherman Act . . . by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.[3]

Our view is that the *Parker* exclusion applies to the rates and practices of public utility enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority; here the Georgia Public Service Commission. Here the regulatory judgment was entered after notice and adversary proceedings.

AFFIRMED.

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[3]On the inapplicability of the *Parker v. Brown* state action exclusionary principle in federally regulated activities, see *United States v. Philadelphia National Bank*, 1963, 374 U.S. 321, 10 L.Ed.2d 915, 83 S.Ct. 1715.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1035~~

GAS LIGHT COMPANY OF COLUMBUS,

Petitioner,

against

GEORGIA POWER COMPANY AND THE SOUTHERN COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1970

No. 1835

Gas Light Company of Columbus,
Petitioner,

against

Georgia Power Company and The Southern Company,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, Georgia Power Company ("Georgia Power") and The Southern Company ("Southern"), file this brief in opposition to the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on March 23, 1971 and respectfully urge that such Petition be denied in all respects.

Question Presented

The sole question presented by the Petition is whether the courts below, that is, the United States District Court for the Middle District of Georgia, and the United States Court of Appeals for the Fifth Circuit, correctly applied this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), in holding that electric utility rate schedules, established by order of the Georgia Public Service Commission,

after full and fair adversary hearings, in which Petitioner participated, may not give rise to a private action under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Sections 3 and 4 of the Clayton Act (15 U.S.C. §§ 14 and 15).

Counterstatement of the Case

A. *The Proceedings Below.*

This proceeding arises out of a private antitrust suit filed by Petitioner against Georgia Power and Southern in the District Court for the Middle District of Georgia *to enjoin the enforcement* of four retail electric rate schedules ordered effective by the Georgia Public Service Commission, and to recover treble damages (R 9).[1]

By order and opinion dated May 14, 1970 (R-227-56; 313 F. Supp. 860; Petition, Appendix A) Judge Elliott of the District Court granted summary judgment to defendants with respect to all but a small portion of the complaint, which is unrelated to the rate schedules involved here, and still remains for further determination in the District Court (R 231, 235-6). The motion for summary judgment was based upon a full and complete stipulation of facts entered into by the parties for the purpose of enabling the court to pass upon the motion (R 29-78). The stipulation was supplemented by both parties at the request of the District Court and the issues were fully briefed (R 147-227, 80-147).

The Petitioner appealed to the United States Court of Appeals for the Fifth Circuit (R 259-61). Briefs were filed by Petitioner and by Respondents, and Petitioner filed a reply brief. In addition, the Court of Appeals granted

(1) References to "R—" are to the Appendix in the Court below. The number following the "R" refers to the page of the Appendix.

leave to Atlanta Gas Light Company, another local Georgia gas utility, to file a brief, *Amicus Curiae,* and Respondents filed an answering brief. Thus, the question presented by this proceeding was fully briefed in both courts below.

Based on this full and stipulated record, the District Court's opinion, and upon the five separate briefs filed with it, the Court of Appeals, on March 23, 1971, unanimously affirmed the order of the District Court, granting summary judgment to Respondents (440 F.2d 1135; Petition, Appendix B).

B. *The Parties To This Proceeding.*

Petitioner ("Gas Light") is a privately owned gas utility regulated as a public service corporation by the State of Georgia through the Georgia Public Service Commission ("Commission"). Respondent Georgia Power is a privately owned electric utility also regulated as a public service corporation by the Commission. Respondent Southern, a utility holding company regulated by the United States Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79 *et seq.;* see S.E.C. File No. 37-59), owns all of the stock of Georgia Power. Southern, as distinguished from its subsidiaries such as Georgia Power, does not engage in the sale of electric energy in Georgia or elsewhere (R 81, 227).

The respective service areas of Petitioner and Georgia Power overlap at Columbus, Georgia, and its environs, so that, in Columbus, and in part of the area around it, Gas Light and Georgia Power compete with each other in the sale of energy (R 227).

C. *The Four Local Retail Electric Rate Schedules which are the Subject of this Proceeding.*

The Petition, and the appeal below, relates solely to four of Georgia Power's local retail electric rate schedules. These are Georgia Power's "B-10-B Rate;" its "Underground Residential Distribution Wiring Plan;" its "Residential Wiring Plan, Rule G;" and its "TE-2 Budget Billing Rate." (R 33-4, 228-31):

It is undisputed that each of these four rate schedules became effective by order of the Commission. Thus, the "B-10-B Rate" had been in effect since 1933, with subsequent amendments, pursuant to the orders of the Commission. The "TE-2 Budget Billing Rate" has been in effect since January 1, 1965 pursuant to Commission order. The "Residential Wiring Plan, Rule G" became effective on January 1, 1960 pursuant to Commission order and was extended for ten years by order of the Commission dated December 19, 1962; and the "Underground Residential Distribution Wiring Plan" has been the subject of two Commission orders dated June 28, 1968 and November 18, 1968[2] (R 34-38, 232-5).

These four rate schedules were described by the Court of Appeals below as follows:

> "Rate Schedule B-10-B
>
> This is a general service rate in effect since 1933 with subsequent amendments. The charge reduces as the load increases. • • •

(2) This last order has been appealed to Georgia's courts by Atlanta Gas Light Company, which like Petitioner was a party to the proceeding before the Commission (R 37). The procedure followed by Atlanta Gas Light Company, that of appealing the Commission's order to the state courts, is the proper method to obtain judicial review of the Commission's orders. Petitioner here, seeking the same end, judicial review of the Commission's orders, has attempted to secure such review from a federal court by utilizing an improper private antitrust suit.

"Rate Schedule TE-2

This is a budget billing plan for homeowners whose primary source of energy is electricity and whereunder the annual electric bill is estimated and divided into twelve equal installments with an adjustment at the end of the year based on actual usage. • • •

"Underground Residential Distribution Wiring Plan

This rate came about in 1967 by reason of the Federal Housing Authority requiring underground wiring in new subdivisions. • • •

"Residential Wiring Plan, Rule G

• • • This schedule was implemented in 1961 pursuant to an order of the Commission but was revised by the Commission in 1962 after hearing. Under it Georgia Power makes a promotional payment of $50.00 to $180.00 per unit if residences or apartments are wired for electric range and electric water heater, dryer or space heating." (440 F.2d at 1137)

Each of these four rate schedules has been the subject of very hotly contested hearing before the Commission, and each of them is the product of an order of the Commission resulting from such hearings.

Thus, in a recent proceeding (Docket 2027-U) in which Petitioner was an active party, the Commission reviewed Georgia Power's "B-10-B" and "TE-2" rates and issued its own order establishing the rate schedules as to which Gas Light complains herein (R 197-209; Petition, Appendix B, pp. xxviii-xxix).

The "Residential Wiring Plan", originally ordered effective by the Commission in 1960 (*Re Georgia Power Company*, 40 P.U.R. 3d 302 (1961)), was established in its present form by an order in 1962 extending the plan for 10 years. This plan was also attacked in the recent hearing to

which Petitioner was a party and in which it actively participated (*See* Commission Docket 2027-U; R 37-8, 197-209).

Finally, Georgia Power's "Underground Residential Distribution Wiring Plan" was the subject of extensive hearings in which Petitioner was an active litigating party before the Commission commencing in 1967, which culminated in the orders of June 28, 1968 and November 18, 1968[3] (R 36-37).

THE OPINIONS BELOW

The courts below reviewed very carefully the various orders concerning Georgia Power's rate schedules which the Commission issued and in particular the Commission's action in Docket 2027-U up to the very date of oral argument in the District Court (Petition, Appendices A and B).

The District Court noted that after many days of hearings, the Commission issued its order, dated November 25, 1969, in which it held that the "TE-2" rate was "just, fair and equitable," and ordered that the rate "be retained in [its] present form." In this order the Commission also mandated that the "Residential Wiring Plan" should remain in effect until January 1, 1973 at which time it would be terminated by its terms. Finally, the Commission's order instructed Georgia Power to submit revisions to its "B-10-B" schedule consistent with certain specifications set forth in the Commission's order (R 236-7).

The District Court concluded that each of the rate schedules complained of by Gas Light was the product of Com-

(3) The Commission twice held:

"Wherefore, it is ORDERED: That the plans submitted on November 14, 1967 by Georgia Power Company be and the same is hereby disallowed" (Stipulation Exhibits C and D, R 55, 62).

The Commission then set forth the specifications by means of which Underground Residential Distribution would have to be provided by Georgia Power. It is those specifications which Petitioner here seeks to attack (Petition, pp. 10-11).

mission action, and not the product of private voluntary action by Georgia Power and Southern. And the District Court noted specifically that the Commission in each of its current orders dealing with these four schedules expressly retained jurisdiction over them "for the purpose of entering any further order or orders as this Commission may deem mete and proper" (R 237).

The Court of Appeals below, in unanimously affirming the District Court's opinion and order, held that:

> *"As we have seen above, the Commission here gave lengthy consideration to each of the practices and rates under attack, and after full adversary hearings ordered them into effect, some with major modifications.* Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. *Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the Commission as products of the Commission.*
>
> • • • • •
>
> "Our view is that the *Parker* exclusion applies to *the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subjected to meaningful regulation and supervision by the state to the end that they are the result of the considered judgment of the state regulatory authority; here the Georgia Public Service Commission."* (440 F.2d at 1140) (Emphasis added).

We must take issue with Petitioner's description of the decision below. The Petition describes the ruling below as follows:

> "The Court of Appeals ruled—in effect—that merely because the dispute concerning respondents' rates and business practices were aired before the

> Georgia Public Service Commission, and merely because the Commission approved (or, really, failed to disapprove) those practices, that the activities of Georgia Power here challenged are *immune* from antitrust sanctions" (Petition, p. 33).

However, the language used by the Court of Appeals as quoted above, without more, makes clear the fatal flaws in Petitioner's characterization.

Thus, the court below did not hold that Georgia Power was granted antitrust "immunities" merely because the Commission heard a dispute over its rates. This suggestion surely misrepresents the tightly reasoned opinion of the court below. That court held, quite correctly, that rates, such as those involved herein, which are the product of the Commission's "considered judgment" as evidenced by the "major modifications" imposed and written by the Commission itself, cannot be said to be voluntary private action; but rather constitute "state action" under *Parker* to which Congress never intended the Sherman and Clayton Acts to apply.

Point I

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Petitioner claims (Petition, p. 11) that five decisions (including the case at bar) of four Courts of Appeals are in irreconcilable conflict over the antitrust immunity granted to state action by *Parker* v. *Brown*.[4] A review of those deci-

(4) *G. R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), *cert. den.*, 400 U. S. 850 (October 12, 1970); *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 438 F. 2d 1286 (5th Cir. January 5, 1971), petition for certiorari filed May 15, 1971 (No. 1712); *Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, 438 F. 2d 248 (4th Cir. February 12, 1971); *Hecht* v. *Pro-Football, Inc.*, 1971 CCH Trade Reg. Rep. ¶ 73, 559, p. 90, 327 (D. C. Cir. April 27, 1971); and the decision below.

sions, however, establishes that they are consistent with each other, and with *Parker*. There is no conflict.

In the *Parker* case, this Court held that Congress did not intend that the antitrust laws should "restrain state action or official action directed by a state" (317 U. S. at 351).

Two of the Court of Appeals decisions cited by Petitioner as declining to apply the *Parker* rule were cases where the state action had been *improperly* induced. Thus, in *Whitten,* the First Circuit held that *Parker* did not apply to a state procurement agency's standards which could be met only by a single supplier, where those standards were established by reason of a conspiracy between that supplier and employees of the state procurement agency. Again, in *Woods,* the Fifth Circuit held that *Parker* did not apply to an order of a state agency where that order was based upon fraud and false statements filed by the defendant The ruling of these two cases is simply and logically that one who defrauds or misleads state agencies, or induces state officers to breach their public duties, cannot claim antitrust immunity for the state action which they themselves improperly induced.

In contrast to *Whitten* and *Woods,* there has never been the slightest suggestion of impropriety on the part of any state officer or employee in this case nor any suggestion that Georgia Power has ever acted improperly in its dealing with the Commission.

The decision of the District of Columbia Circuit in *Hecht,* cited by Petitioner as one of the cases involved in "irreconcilable" *Parker* conflict, did not even involve the *Parker* doctrine. The case concerned the interpretation of two federal statutes. The sole question in that case was whether enabling legislation enacted by Congress authorizing the District of Columbia Commissioners to construct and enter into contracts with respect to a sports stadium superseded the Sherman and Clayton Acts and permitted exclusive dealing contracts with professional football teams. The Court

of Appeals for the District of Columbia held that in approving this minor enabling legislation, which dealt merely with the construction of a sports stadium, Congress did not intend, by implication, to eliminate the applicability of the basic and important provisions of the Sherman Act. It is evident, therefore, that "state action" in the *Parker* sense was simply not involved.

None of the foregoing three cases is in conflict with either the Fourth Circuit decision in the *Washington Gas Light ("VEPCO")* case or with the case at bar. In neither of the latter cases is there any issue of collusion with state officials or of fraud practiced by private parties on state officials. Nor is there any contention here, as in *Hecht,* that limited purpose *federal* legislation should be stretched to abrogate the *federal* antitrust laws, contrary to the legislative intent. Both the *VEPCO* case and the case at bar involve state agencies regulating local public utilities under broad grants of authority by the state legislatures. Such legislation authorizes the utilization of private monopolies in furnishing, for example, electric and gas services and provides for comprehensive regulation of those monopolies by Public Service Commissions.

In the *VEPCO* case an important issue was whether the Virginia Commission had actually "approved" the rate schedules filed with it. There were no hearings before that Commission and the "approval", as the Fourth Circuit Court of Appeals held, was inferred from the fact that the Commission had an opportunity to reject the rate schedules and did not do so (438 F.2d at 252).

No such issue exists in the case at bar. The Georgia Commission held hearings, heard the adversaries, and affirmatively approved the rate schedules after directing modifications. This case does not deal with schedules as to which the state agency was silent.[5] The Court of Appeals

(5) The *VEPCO* decision will not be brought before this Court because the parties have settled their controversy and accordingly certiorari will not be sought (Public Utilities Fortnightly, Vol. 87, No. 13, June 24, 1971, p. 61).

below did not infer state approval from any equivocal act, and the Court of Appeals expressly noted this difference between the *VEPCO* case and the case at bar:

> "[I]t is not necessary for us to extend the *Parker* exclusion to the point of its extension in *Washington Gas Light and we do not do so.*" (440 F.2d at 1140) (Emphasis added).

This clear language and holding of the Court below belies Petitioner's unworthy characterization of the opinion below as, "relying heavily on the recent Fourth Circuit decision, *Washington Gas Light Co.* v. *Virginia Electricity & Power Co., supra*" (Petition, p. 23).

The case before this Court involves retail electric rate schedules which were the subject of major antitrust attack by Petitioner and others before the Georgia Public Service Commission, and which were the subject of lengthy adversary proceedings. The schedules involved in this case were not merely "approved" by the Commission. Indeed substantial provisions of Georgia Power's proposals were *rejected* and then rewritten by the Commission.

Point II

THE COURTS BELOW PROPERLY APPLIED THE RULE OF *PARKER v. BROWN.*

Petitioner argues in support of its Petition that the Courts below improperly applied the doctrine enunciated by this Court in *Parker* v. *Brown.* We submit that the Courts below were both correct in applying the *Parker* doctrine and that their decisions are in full accord with the decisions of this Court and of the United States Courts of Appeals which have passed upon this doctrine.

Petitioner appears to misunderstand the holding of *Parker* v. *Brown.* This landmark case which even Peti-

tioner now agrees should not be overruled,[6] held in no uncertain terms that:

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. • • •
>
> " • • • It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. • • •
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake the prohibit." (317 U. S. at 351, 352)

Thus, the rule of *Parker* is that Congress did not intend the antitrust laws to weaken or destroy regulatory policies or machinery established by the states. The wisdom of *Parker* is evidenced by the fact that in the nearly 30 years of its effectiveness, it has been reaffirmed at least twice by this Court, and has not been challenged by Congress (See *Noerr* and *Pennington*, footnote 6, below).

Moreover, the recent decisions of the United States Court of Appeals, two of which Petitioner chooses to ignore, have applied *Parker* in a sensible and wholly consistent manner.

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(6) At oral argument in the District Court Petitioner took the astonishing position that *Parker* v. *Brown* was no longer good law, until confronted with *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965). In its brief before the Court of Appeals Petitioner conceded grudgingly that *Parker* v. *Brown* still has some limited vitality.

Thus, in *Allstate Insurance Co.* v. *Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965), aff'd 361 F. 2d 870 (4th Cir. 1966), *cert. den.* 385 U. S. 930 (1966), a case in many ways similar to the case at bar, the plaintiff, a regulated insurance company, claimed that the creation, under North Carolina law, of a rate-fixing insurance bureau whose activities were closely regulated by state officials, constituted a violation of the Sherman Act. The Fourth Circuit Court of Appeals, affirming the conclusions of the District Court, held that:

> "The District Court's finding in the present case that the North Carolina Rating Bureau was operated under the active supervision of the State is not challenged in this Court, and we find no merit in the distinction suggested by appellants between the injunction sought in *Parker* v. *Brown* and the declaration of pre-emption sought here. The central question in both cases is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker* v. *Brown*, the North Carolina Statutory Plan is clearly valid." (361 F. 2d at 872)

And, in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52 (1st Cir. 1966), *cert. den.* 385 U. S. 947 (1966), a case which Petitioner chooses to ignore in his discussion of a "conflict in the Circuits", the First Circuit held, in the face of a Sherman Act conspiracy claim by plaintiff, who was a rejected franchisee, that the franchise granted by the Massachusetts Port Authority, a legislatively created agency of the state, to plaintiff's competitor at Logan Airport, was beyond the reach of the Sherman Act under *Parker* v. *Brown* even though the granting of the franchise effectively put plaintiff out of business:

> "What was done here was done in the exercise of a valid governmental function. *The antitrust laws are aimed at private action, not at governmental action.*" (362 F. 2d at 55) (Emphasis added)

In *Sun Valley Disposal Co., Inc.* v. *Silver State Disposal Co.* 420 F. 2d 341 (9th Cir. 1969), another case ignored by Petitioner, the Ninth Circuit Court of Appeals held that the granting of an exclusive contract to the defendant by the County Commissioners, pursuant to the provisions of a state law, could not support a claim that this contract constituted a violation of the Sherman Act. The Court of Appeals affirmed the summary judgment granted by the District Court on the basis of the *Parker* doctrine.[7]

In the District Court below, Petitioner suggested that the *Parker doctrine,* if it had any vitality at all, protected only officers or direct agents of the state, but not "private parties" who are compelled by State law to carry them out. Obviously, this position was wholly untenable. See *Noerr* and *Pennington,* footnote 6, *supra,* where this Court applied *Parker* v. *Brown* to private parties.

Although Petitioner abandoned this argument in the Court of Appeals, it repeats here, as it did below, the argument that under Parker, the antitrust laws are *inapplicable only* to those "limited instances and . . . rare and extreme circumstances" where "a state legislature may make a deliberate and conscious decision directing private business entities to engage in anti-competitive conduct which would contravene the principles of free and open competition demanded by federal antitrust laws." (Petition, p. 16) Petitioner argues, however, that the antitrust laws are *fully applicable to those very same acts* when commanded by a state regulatory agency pursuant to a grant of general regulatory authority, by the same state legislature. Respondents submit that this argument is, on its face, wholly untenable.

To accept Petitioner's narrow and distorted "interpretation" of the rule of *Parker* v. *Brown* would drain it of any

(7) This decision has recently been reaffirmed by the Ninth Circuit in *John Kalin Funeral Home Inc.,* v. *Fultz* (1971 CCH Trade Cases § 73,596, p. 90, 465) (May 28, 1971).

viable function or meaning. The reason is obvious. Governments simply do not operate in that fashion. When legislatures desire to regulate an industry, and take it out of the rules of the open market, they create agencies and empower them to regulate the industry, fix rates and review the business practices of the industry. Legislatures never themselves establish the precise rules, regulations and rates to be followed by the regulated industries.

Acceptance of Petitioner's position in this litigation would deprive the states of the power to regulate those businesses in the usual way that they do so[8]—by an agency under a general enabling statute which provides only general directions. Certainly, Congress in enacting the Sherman and Clayton Acts, and this Court in *Parker,* never intended to prevent the states from regulating industries by use of the very same procedures used by the Congress itself.

Indeed the power of a state, to regulate by legislation, those businesses "affected with a public interest" has not been open to question for decades. And it matters not that one of the methods of regulation adopted is the fixing of prices to avoid "destructive and demoralizing competitive conditions," even with respect to a business that is not commonly considered to be a "public utility." *Munn* v. *Illinois,* 94 U. S. 113 (1876); *Nebbia* v. *New York,* 291 U. S. 502 (1934); *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251 (1936). The power of a state to so regulate a public utility has been generally conceded. See *Nebbia, supra,* 291 U. S. at 531, 532.

Nor does it matter that the act required to be performed under the regulatory system adopted by the state would

(8) All fifty states have created agencies to regulate the furnishing of utility services to ultimate consumers. Federal Power Commission Report entitled *"Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities 1967",* U.S.G.P.O. No. F.P.C. S-184.

conflict with the antitrust laws if performed privately and voluntarily. In *Parker,* this Court stated:

> "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate.
>
> • • • • •
>
> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (317 U. S at 350, 351)

Finally, Petitioner's continued assertion that the rates of which it complains are private and voluntary is wrong, both factually and as a matter of law. This becomes especially clear, in light of *Parker,* when it is realized that if Georgia Power attempted to deviate, in any way, from those rates, it would be exposed to severe criminal and civil penalties (Georgia Code §§ 93-416, 417, 9901). In *Parker,* this Court said:

> "Here the state command to the Commission and to the program committee of the California Prorate

> Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. *Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions." (317 U. S. at 352) (Emphasis added)

Thus, the hallmark of "voluntary action" in terms of *Parker, i.e.*, that the action may be altered freely without penalty, is absent in this case. On the other hand, the hallmark of "state action", in terms of *Parker, i.e.*, that any deviation from the required act may subject Georgia Power to state sanctions, is clearly present. Based upon even this, the simplest of tests, there can be no doubt this case involves action mandated by the state.

Accordingly, the conclusion is inescapable that the courts below applied *Parker* quite correctly in holding that the orders of the Commission constitute state action and thus are beyond the reach of the antitrust laws.

Point III

THE CONCEPT OF PRIMARY JURISDICTION IS TOTALLY IRRELEVANT TO THE INSTANT ACTION.

Petitioner's Point III represents a new contention never raised before in this litigation. It therefore cannot be raised at this time. Supreme Court Rule 40(1)(d)(2); See, *Neely* v. *Eby Construction Co.*, 386 U. S. 317, 330 (1967). Moreover it clearly is without merit. Petitioner's claim is that the Court below misapplied the concept of "primary jurisdiction" and substituted "administrative regulation" for "anti-trust protection" (Petition, p. 33). Petitioner then chastises the Court below for ignoring the series of cases which deal with the proper role of the antitrust laws in the deliberations of specialized *federal* agencies.[10]

One can hardly find a group of cases more irrelevant to the issue of *Parker* v. *Brown* than these federal administrative agency cases. In these cases, this Court was balancing the competing interests of two sets of federal statutes, and the policies underlying them. The question before the Court in each case was whether Congress intended the agency involved to suspend or ignore the antitrust laws, or intended that the regulated industry be immunized from antitrust sanctions. We have no such question here. This Court decided almost thirty years ago in *Parker* that Congress did not intend the antitrust laws to apply to the acts and activities mandated by the *states*. In so doing, a major federal-state constitutional conflict was avoided. The application of the antitrust laws to the states, as proposed

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(10) *Carnation* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966); *U. S.* v. *Radio Corp. of America*, 358 U. S. 334 (1959); *U. S.* v. *Pan American World Airways*, 371 U. S. 296 (1963); *California* v. *F.P.C.*, 369 U. S. 482 (1962); *U. S.* v. *Philadelphia National Bank*, 374 U. S. 321 (1963); and *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963).

by Petitioner, despite its somewhat disingenuous disclaimer of any such intent, would simply lead directly into that conflict and would ultimately result in denying to the states the ability to regulate, in any substantial sense, the industries and businesses of their citizens which the states conclude are "affected with a public interest."

Although Petitioner claims that the rule it offers would have no effect on the power of the states to regulate utilities or establish their rates, the simplest analysis of its position reveals that the reverse would be true. In this action Petitioner has sought to *enjoin* Georgia Power from carrying out a rate schedule mandated by the State of Georgia. Obviously, the issuance of any such injunction would compel Georgia Power's management to choose between disobeying a federal injunction and subjecting itself to Georgia's civil and criminal penalties. Unless Petitioner really intends the federal injunction it seeks to be ineffective, the necessary result is the destruction of the valid orders of the Public Service Commission by the federal court.

Therefore, Petitioner's assertion (Petition, p. 32) that it does not seek "to have the federal antitrust laws vitiate important local policies the achievement of which require that states expressly prohibit or suspend some principles of open competition" can hardly be accepted as a basis for action by this Court.

Conclusion

Despite its assertion of seeking only modest relief, Petitioner seeks nothing less than to destroy the power of the states to regulate local utilities and to establish local utility rates. Petitioner seeks this result not by direct action against or within the state but rather indirectly by an improper private antitrust action against those who follow the command of the state. In *Parker* v. *Brown* this Court held that Congress did not intend so to shackle the states by authorizing private antitrust actions against those who carry out state policies. Unless this Court is prepared to overrule *Parker* v. *Brown,* which neither Congress nor this Court has seen fit to do in nearly thirty years, the Petition must be rejected.

For this reason, and because Petitioner has failed utterly to show that there is any split in the circuits with respect to the application of the *Parker* doctrine, or that any other compelling reason exists for granting Certiorari in this case, the Petition for a Writ of Certiorari should be, in all respects, denied.

Dated: July 16, 1971

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~1835~~ 70-290

GAS LIGHT COMPANY OF COLUMBUS, *Petitioner*

vs.

GEORGIA POWER COMPANY and
THE SOUTHERN COMPANY, *Respondents*

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents Georgia Power Company and The Southern Company have attempted by semantic sleight of hand to obfuscate the importance of the issues raised by the decision of the United States Court of Appeals for the Fifth Circuit, below. The respondents have utterly failed to negate the cogent reasons presented in the petition warranting this Court's review of the case.

Rather than confronting the question of the nature and extent of the *Parker v. Brown* [317 U.S. 341 (1943)] antitrust immunity, and the policies and considerations which limit its application, respondents have contented themselves with meaningless and superficial distinctions between our case and some of those cited in the petition. [See, for example the respondents' unsuccessful attempt to distinguish the decision of the Fifth Circuit herein from *Hecht v. Pro-Football, Inc.*, 1971 CCH Trade Reg. Rept. ¶73,559 (D.C. Cir. 1971), which recognized the limited nature of the *Parker* immunity. (Resp. Brief, pp. 8-10).]

At page 15 of their brief, respondents, perhaps inadvertently, reveal the true danger of the Fifth Circuit's ruling in our case. Respondents concede that in recent decades, state regulation of "businesses affected with the public interest" has proliferated. Most of these regulated industries are supervised by state administrative agencies. Under the decision of the Fifth Circuit, any agency approval of a practice proposed by one of the regulated businesses immunizes that conduct from federal antitrust sanctions even though neither the state legislature nor the regulating agency intended such immunity.

Such an unjustified expansion of the *Parker v. Brown* immunity would seriously weaken the application of federal antitrust policies to anticompetitive practices occurring within these numerous and significant sectors of the economy. The ruling below and the view propounded by the respondents herein is completely inconsistent with rulings recognizing the antitrust laws as "* * * our economic magna carta * * *" [*Woods Exploration & Producing Co., Inc. v. Aluminum Company of America,*

438 F.2d 1286, 1302 (5 Cir. 1971)], as well as this Court's frequent admonitions against assumptions or expansions of antitrust immunity. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 217-218 (1966); *United States v. Philadelphia National Bank,* 374 U.S. 321, 350-351 (1963); *United States v. Pan American Airways,* 371 U.S. 296 (1963).

The issue of the *Parker v. Brown* immunity has, in the past few years, become one of significant importance to the administration of the antitrust laws. The continuing and growing controversy among lower federal courts concerning the nature and extent of that immunity can be resolved only through a definitive decision by this Court. For that reason the present petition for a writ of certiorari must be granted.

ARGUMENT

THE EXISTING CONFLICT AND CONFUSION AMONG THE VARIOUS COURTS OF APPEAL CONCERNING THE NATURE OF THE PARKER v. BROWN IMMUNITY CONTINUES TO EXPAND: NORMAN'S ON-THE-WATERFRONT, INC. v. WHEATLEY, 1971 C.C.H. TRADE REG. REPTS. PAR. 73,606, p. 90,490 (3 CIR. JUNE 17, 1971).

Respondents argue that no conflict exists among the decisions of Courts of Appeals in various circuits concerning the application of the *Parker v. Brown* immunity. Such a position (inherently incredible to anyone who has carefully read the opinions cited in the petition) becomes devoid of the slightest trace of merit after the decision of the Third Circuit Court of Appeals in *Norman's On-the-Waterfront, Inc. v. Wheatley, supra.* In that case, Judge

Adams noted the various conflicting decisions and the minute, and relatively meaningless distinctions upon which recent determinations of immunity *vel non* have been based. The Court in *Norman's* reached the correct result, but for the wrong reason, concluding that the *Parker* immunity was inapplicable because of the nature of the state agency's role in relation to the anticompetitive practice.

Norman's, our case, and many of the recent rulings on this issue reflect the great confusion surrounding the extent of the *Parker* immunity. This confusion has been generated by the failure of many lower federal courts to recognize and apply the underlying policy of the *Parker* ruling.

Parker was obviously not intended to create antitrust immunity for private anticompetitive activity merely because such is approved by the state. 317 U.S. at pp. 350-351. Rather, immunity is created only in those extremely rare situations in which the state deliberately and purposefully interdicts a particular aspect of competition which would interfere with a significant state policy.

In our present case, however, the application of the antitrust laws as here sought by petitioner, Columbus Gas Light, is consistent with and, indeed, in furtherance of the policy of the State of Georgia favoring competition between suppliers of natural gas and suppliers of electricity. To apply the *Parker* immunity to such a case would defeat the purpose of the *Parker* decision itself by simultaneously frustrating the State's policy as well as federal antitrust enforcement. Where, as here, the State's interest is consistent with the federal antitrust laws, there exists no justification or reason for the *Parker* immunity to

arise. See *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America*, 438 F.2d, at p. 1303. Thus, the ruling of the Fifth Circuit below, constitutes a patently erroneous and unwarranted "repeal of the antitrust laws by implication from a regulatory statute." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

Respondents ignore these important policy questions and address themselves to factual distinctions which are immaterial to the controlling issues surrounding the *Parker* immunity. Indeed, these superficial, factual "distinctions" merely add to the confusion. For example, respondents' assertion that the decisions in *G. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1 Cir. 1970), *cert. den.*, 400 U.S. 850 (Oct. 12, 1970), and *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, supra,* do not conflict with the Fifth Circuit decision in this case when carefully considered, provides yet another persuasive argument for the granting of certiorari by this Court. To suggest, as the respondents do, that the *Whitten* and *Woods* Courts were correct in declining to apply *Parker v. Brown, supra,* because in those cases "the state action had been improperly induced" (Respondents' Brief, page 9), is to emasculate this Court's protection of First Amendment rights articulated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961). In *Noerr,* this Court, in holding that joint solicitation of governmental action with respect to the passage or enforcement of laws did not offend the Sherman Act, made it perfectly clear that the result was in no way affected by the truth or falsity of

the representations made in the solicitation effort. Noting that the deceptive propaganda used in a publicity campaign to solicit government action "falls far short of the ethical standards generally approved in this country" (365 U.S. at 140), this Court went on to say:

> "* * * But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And *that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.* That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement." 365 U.S. at 144. (Emphasis added.)

If joint *solicitation* of governmental action is immunized from antitrust action, *even if the solicitation involves the use of false, fraudulent or misleading propaganda,* then it seems utterly preposterous to argue that actual governmental action taken as a result of the solicitation creates antitrust liability. If the First Amendment protects an industry in *seeking* governmental action without respect to the truthfulness of the representations, then antitrust immunity afforded by the *Parker* doctrine cannot be made to depend upon so ephemeral an issue as to whether the government was "improperly induced" by false, fraudulent or misleading representations.

This shows the confusion which permeates respondents' attempt to reconcile the various decisions in the circuits. The *Noerr* immunity is bottomed on the First Amendment; *Parker v. Brown* immunity involves a balancing of the Federal-State relationships. *Parker v. Brown* immunizes

from antitrust attack private conduct directly responsive to the mandate of a state which has made a conscious and deliberate decision that competition within a given industry should be subordinated to a greater governmental objective. The application of this doctrine cannot be made to depend upon whether the state was correct or incorrect in its judgment or whether the state was induced by fraudulent, false, or misleading representations of those who would be affected by its sovereign judgment. In arguing that the *Parker* doctrine applies only where the state is not misled, respondents not only open a Pandora's Box, but create philosophical irreconcilability with First Amendment protection under *Noerr*. Under respondents' theory all "state action" cases predictably will raise fact issues as to whether the state acted upon information which was false, fraudulent or misleading and which thereby induced it to make an "erroneous" judgment.

State action is state action, whether it is "right" or "wrong". The state action which this Court held immunized from antitrust attack in *Parker v. Brown* was a deliberate decision to save an entire industry from the effects of drastic overproduction at the expense of lessening competition. No such decision has been made in this case by the State of Georgia. Indeed, the contrary is true. If routine decisions of any and every state agency rise to the level of immunizing private, anticompetitive practices even if such immunity depends upon a showing that the state was not misled, then *meaningful* antitrust enforcement cannot long endure. For as stated in the petition, every exercise of primary jurisdiction by a state administrative body would carry almost automatic immunity from federal

antitrust sanctions. Certainly this Court did not intend such a result by its ruling in *Parker v. Brown, supra.*

CONCLUSION

The existent confusion and uncertainty concerning the nature and extent of the *Parker v. Brown* immunity from antitrust remedies has been greatly exacerbated by the ruling of the Fifth Circuit below. Lower federal courts have expanded the *Parker* immunity so as to threaten the efficient administration of the federal antitrust laws. A ruling by this Court is necessary in order to clarify the law and to re-establish the original boundaries of the state action immunity.

For the reasons stated above, as more fully stated in the petition previously filed herein, the petition for writ of certiorari should be granted.

Dated, August 5, 1971.

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PETITION

FOR

REHEARING

...RY
SUPREME COURT, U. S.
... U. S.

Supreme Court, U.S.
FILED
FEB 17 1972
E. ROBERT ... CLERK

IN THE

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Petitioner,

versus

GEORGIA POWER COMPANY and
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Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Gas Light Company of Columbus, Petitioner, respectfully prays that this Court grant rehearing of its order of January 24, 1972, denying the petition for writ of certiorari, ___ U. S. ___, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above case as prayed for in the petition filed June 16, 1971 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I.

Since this case was submitted to this Court on the petition for certiorari and the briefs of Petitioner and

Respondents, the United States District Court for the Northern District of California has issued a further decision in *Marnell v. United Parcel Service of America, Inc.* The later decision was filed October 28, 1971 and is reported at 1971 Trade Cases ¶73,761. That decision, as well as the earlier decision in the same case (260 F. Supp. 391) is directly contrary to the decision of the Fifth Circuit Court of Appeals in the instant case. Petitioner does not suggest that this conflict alone justifies the granting of certiorari. Considered, however, in context with the conflict in the decisions by five courts of appeals in four circuits which have been issued since 1970 alone (discussed at pages 11-14 of the petition for certiorari), the second *Marnell* decision, we submit, does demonstrate the continuing importance of the question involved[1] and of the conflict itself.

Marnell was a private antitrust action against a holding company and its subsidiary—a state regulated motor carrier—for damages for destroying competition

[1] If the opinion of the Circuit Court is allowed to stand, a major segment of one of the largest industry groups in the United States will be virtually free from the operation of the federal antitrust laws. The 1970 *Statistical Abstract of the United States*, prepared by the United States Department of Commerce, contains a tabulation (p. 475) of the total assets and annual receipts of active corporations in the United States as shown by federal income tax returns. This tabulation groups corporations into eight basic categories, one of which covers public utilities—"transportation, communication, electric, gas, sanitary service." Of these eight categories, only two—"manufacturing" and "finance, insurance, real estate"—have greater assets or annual receipts than utilities. This tabulation shows that as of 1967, utilities had assets in excess of 220 billion dollars and annual receipts in excess of 100 billion dollars. The states, almost without exception, have adopted schemes for the regulation of utilities. See, e.g., Welch, *Cases and Text on Public Utility Regulations* 579 (rev. ed., 1968). Hence the premise for a "state action" defense will be available in a substantial portion of antitrust actions filed against utilities.

and attempting and conspiring to monopolize the retail parcel delivery market in certain major cities in California. The defendants, among other things, filed a motion for a stay of the action pending the referral of certain issues to the California Public Utilities Commission. (260 F. Supp. at 396) In denying the motion, the court held that a determination by the state commission under the standards of the Public Utilities Code—whether the "rates and practices were just, reasonable and not unduly discriminatory" (260 F. Supp. at 414)—would be

> "neither useful nor determinative upon the issue of monopoly presented in this case, i.e., whether those rates—whether lawful or not, have been used, among other things, to monopolize a market. If so used the mere lawfulness or unlawfulness of the rates for transportation purposes as between defendants and the shipping public would be immaterial." (260 F. Supp. at 414)

This holding was based upon the following analysis of *Parker v. Brown*, 317 U. S. 341 (1943):

> "It is apparent that the regulatory scheme of the California Public Utilities Code is quite different from the regulatory scheme of the Prorate Act considered in Parker v. Brown, supra.
>
> "Although California's scheme of regulation for motor carriers emanates from the state as sovereign to carry out the declared purposes of the Public Utilities Code, the regulatory scheme is one of general supervision rather than one of specific direction.
>
> "Although the California Public Utilities Code requires and directs that motor carriers shall not operate without compliance with certain of its provisions (e. g., requiring an operating permit or

> certificate) and although it further provides and directs that motor carriers must affirmatively do other things (e. g., file rate schedules in the case of common carrier operations and refrain from charging less than the minimum rates fixed by the Commission), the Act does not otherwise affirmatively direct what the carriers' rates or contracts shall be—except that they shall be reasonable.
>
> ". . . .
>
> "Certainly, the California Public Utilities Code could not and has not directed defendants to create or attempt to create a monopoly in violation of the federal antitrust laws nor to do any of the acts charged in the complaint as having been done with the intent to create a monopoly." (260 F. Supp. at 409-10)

At the trial before the court without a jury, the motions to stay were renewed. The following is from the decision by Justice Clark (sitting by designation) in the second decision:

> "Thereafter motions to stay and for a certificate allowing an interlocutory appeal under 28 USC §1292(b) were also overruled. Judge Sweigert filed a learned and comprehensive opinion thereon. *Marnell v. United Parcel Service of America, Inc.* [1966 Trade Cases ¶71,913], 260 F. Supp. 391 (N. D. Cal. 1966). The motions have been renewed and they are each denied on the ruling of Judge Sweigert." (1971 Trade Cases at 91,208)

Since the regulatory scheme under the public utility laws of Georgia administered by the Georgia Public Service Commission is comparable in its essential features with the California Public Utilities Code, the direct conflict presented by the *Marnell* decisions is inescapable, and, we respectfully submit, inevitable unless this Court resolves the conflicts among the cir-

cuits. It is significant that at the time of the second *Marnell* decision, the Fifth Circuit's opinion in the instant case, as well as that of the Fourth Circuit in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F. 2d 248 (1971), had been issued, and were available to the district court as precedent.

II.

Since this case was presented to this Court on the petition for certiorari and briefs of the parties, this Court, on January 13, 1972, issued its decision in *California Motor Transport Co. v. Trucking Unlimited*, ___ U. S. ___, 92 S. Ct. 609, in which it was held that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct violative of the antitrust laws. *California Transport* is an extension of views expressed by the Court in *Eastern Railroad Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U. S. 657 (1965). The Court has stated that the conclusion reached in *Noerr* was a corollary of its decision in *Parker v. Brown, supra*. See *California Motor Transport Co. v. Trucking Unlimited, supra*, 92 S. Ct. 609, 614 at n. 3. The doctrines established by both lines of cases provide related and limited immunity from the federal antitrust laws. *Noerr* immunity permits the exercise of First Amendment rights, while the *Parker* immunity is presumably recognized to permit the implementation of valid governmental action. The reasoning of this Court in *California Transport* and its decision to remand for trial has a substantial effect upon the instant case, we submit, in view of the action of the Court of Appeals in affirming a summary judgment for

the defendants without comment upon the conspiracy issue.[3] In *California Transport*, this Court held that:

> "Petitioners [certain highway carriers], of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> "It is well-settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." (92 S. Ct. at 613)

California Transport recognizes that concerted and continued use of First Amendment rights to violate the antitrust laws is not protected although any given exercise of such rights (in that case, efforts to prevent competing carriers from obtaining operating authority through administrative and judicial processes), when separately viewed, is protected. In the Court's words:

> "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result viz. effectively barring respondents from access to the agencies and courts." (92 S. Ct. at 613)

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[3] "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ." *Poller v. Columbia Broadcasting System*, 368 U. S. 464, 473 (1962); *Accord: Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700 (1969).

Similarly, a concerted and continued conspiracy to violate the antitrust laws should not find refuge in *Parker* because of episodic state agency approvals of particular antitrust violations undertaken pursuant to the conspiracy, although it may be assumed *arguendo* that approval by a state agency of a particular practice, when separately viewed, would find immunity under *Parker*.

In the instant case, Petitioner contends that Respondents engaged in various monopolistic anticompetitive practices and that they combined with each other and with additional co-conspirators to suppress or eliminate the competition from suppliers of natural gas including Petitioner, by various predatory means. (R. 33-34) The Court of Appeals held that certain piecemeal approvals of particular practices undertaken by Georgia Power Company, one of the Respondents, in furtherance of the conspiracy, provided immunity from the antitrust laws.[4]

This conclusion, we respectfully submit, is totally at odds with the reasoning of the Court in *California Transport*.

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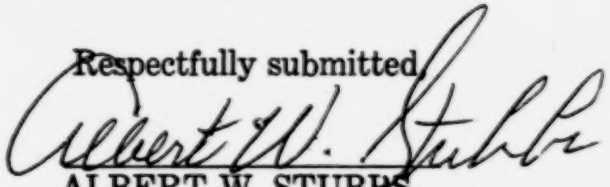
[4] Even where the application of the *Parker* doctrine has been found appropriate, it has been held that alleged governmental compulsion cannot furnish immunity if the activities were the result of a conspiracy rather than the governmental action. See *Wainwright v. National Dairy Products Corp.*, 304 F. Supp. 567, 574-75 (N. D. Ga. 1969).

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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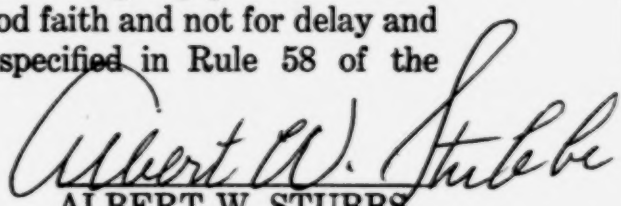
CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.



ALBERT W. STUBBS
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, ALBERT W. STUBBS, an attorney of record for Gas Light Company of Columbus, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served copies of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari on each of the other parties hereto by depositing three copies of the same in a United States Mail Box with Air Mail postage prepaid, addressed to the respective counsel of record for such parties at their post office addresses, as follows:

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